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121 121





United States
Court of Appeals
for the Ninth Circuit.

of MYRON SELZNICK, Deceased, BANK
AMERICA NATIONAL TRUST and SAV-
INGS ASSOCIATION, DAVID O. SELZ-
NICK and CHARLES H. SACHS, Executors,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Application to Review a Decision of the Tax Court
of the United States.

FILED



**United States
Court of Appeals**

for the Ninth Circuit.

of MYRON SELZNICK, Deceased, BANK
AMERICA NATIONAL TRUST and SAV-
INGS ASSOCIATION, DAVID O. SELZ-
NICK and CHARLES H. SACHS, Executors,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of Record

**Application to Review a Decision of the Tax Court
of the United States.**

Count of Squares

for the Square of

A METHOD FOR THE
COUNT OF SQUARES
IN A RECTANGLE

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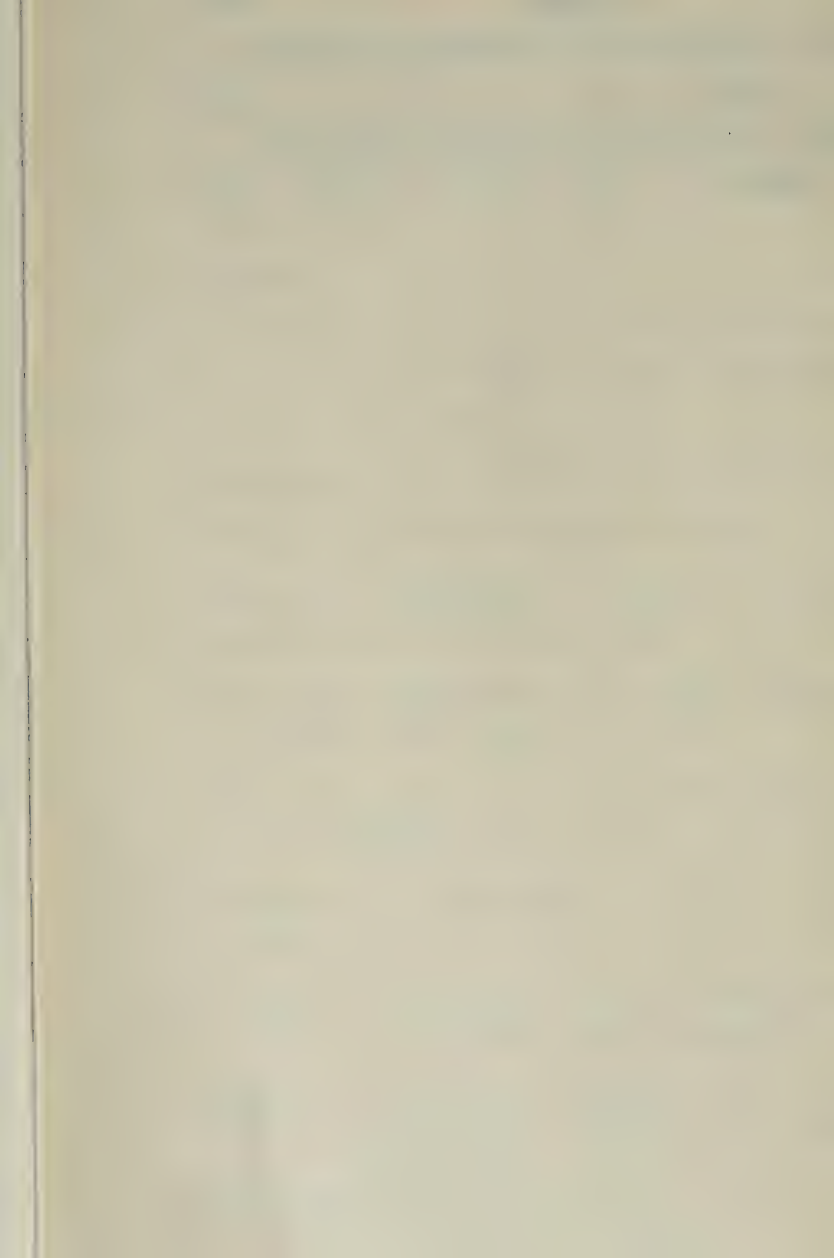
NOTE: When deemed likely to be of an important nature, doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein. When possible, an omission from the text is indicated by *italic* the two words between which the omission seems

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itioner:

EPH D. BRADY, ESQ.,
L. NOSSMAN, ESQ.,
CIEN W. SHAW, ESQ.

pondent:

A. TONJES, ESQ.

Docket No. 14985

E OF MYRON SELZNICK, Deceased,
NK OF AMERICA NATIONAL TRUST
D SAVINGS ASSOCIATION, DAVID O.
ZNICK and CHARLES H. SACHS, Ex-
ors,

Petitioners,

vs.

SSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

- Petition received and filed. Taxpayer notified. Fee paid.
- Copy of petition served on General Counsel.
- Request for Circuit hearing in Los An-

1947

Aug. 20—Copy of answer served on taxpayer.
Angeles Calendar.

1948

Sept. 23—Hearing set November 29, 1948
Angeles, California.

Nov. 29—Hearing had before Judge Van Fossan on the merits. Stipulation of facts with exhibits 1-A thru 11-K attached. Taxpayer's brief due 1/13/49. Respondent's brief 2/14/49. Petitioner's reply brief 2/14/49.

Dec. 21—Transcript of hearing 11/29/48 filed.

1949

Jan. 11—Brief filed by taxpayer. Copy served.

Feb. 1—Motion for extension to 3/12/49 to file reply brief, filed by General Counsel.
Granted to 3/12/49.

Apr. 1—Memorandum Opinion rendered by Judge Van Fossan. Decision will be rendered under Rule 50. Copy served.

Apr. 13—Motion to withdraw the memorandum opinion and to permit filing of taxpayer's supplementary brief, brief filed by taxpayer. 4/14/49 Denied.

Apr. 25—Motion for review by the Court of Appeals of a division filed by taxpayer.
Denied.

May 3—Computation for entry of decision filed by General Counsel.

May 4—Hearing set 6/1/49 on settlement.

-Decision entered. Judge Van Fossan.
Div. 9.
-Order and decision entered. Judge Arundell. Div. 7.
-Petition for review by U. S. Court of Appeals, 9th Circuit with assignments of error filed by taxpayer.
-Proof of service filed.
-Designation of record filed by taxpayer. Service acknowledged thereon.
-Certified copy of order from 9th Circuit for transmission of original exhibits 2-B, 3-C, 4-D, 5-E, 6-F, 7-G, 8-H, 9-I and 10-J filed.

the Tax Court of the United States

Docket No. 14985

E OF MYRON SELZNICK, Deceased,
K OF AMERICA NATIONAL TRUST
O SAVINGS ASSOCIATION, DAVID O.
ZNICK and CHARLES H. SACHS,
utors,

Petitioners,

vs.

SSIONER OF INTERNAL REVENUE,
Respondent.

petitions for a redetermination of the assessed deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (LA:ER-100 NAB) dated March 27, 1947, and as a basis for the proceeding alleges:

1. Bank of America National Trust and Savings Association, a national banking association organized under the laws of the State of California, O. Selznick and Charles H. Sachs are the co-executors appointed and acting executors of the last will and testament of Myron Selznick, who died on March 23, 1944. The Federal estate tax return for the estate of said decedent was duly filed with the District Collector of Internal Revenue for the 6th District of California on June 22, 1945 and the amount of \$294,099.92 was paid to said Collector on said date as Federal estate tax of said estate.

2. The notice of deficiency (a true and correct copy of which with accompanying statement is attached hereto and is marked Exhibit A) was issued by respondent on March 27, 1947.

3. The taxes in controversy are estate taxes in the amount of \$409,634.05—the asserted deficiency of \$384,634.05 plus the amount of an overpayment hereby claimed of not less than \$25,000.

4. The determination of deficiency in the amount set forth in the said notice of deficiency is based on the following errors:

- (1) Respondent erred in determining the fair market value of 100 shares owned by decedent of the stock of Myron Selznick, Inc., a New York corporation,

ent and in failing to determine that the said stock was not in excess of \$12,592.50
ate.

espondent erred in determining that the 1000 shares owned by the decedent of ock of United Studios, Inc., a Delaware on, was \$12,000 on the date of decedent's in failing to determine that the value of was not in excess of \$6,000 on said date. espondent erred in determining that the commissions payable by clients, whom de- presented as agent, was \$271,590.21 and in determine that the value of said commis- able was not in excess of \$79,390.42.

espondent erred in determining that the he claim of decedent for commissions re- nder a contract between Myron Selznick n Selznick, Inc., parties of the first part d Hayward, Leland Hayward, Inc., Le- ward and Co., Ltd., Leeward Royalties, Deverich and Hayward-Deverich, parties ond part, was \$9,594.77 on the date of de- eath and in failing to determine that the said claim was not in excess of \$2,186.67. espondent erred in determining that the the claim of decedent for commissions agency contract with Hunt Stromberg 000 on the date of decedent's death and to determine that said claim had no value
ate

should be included in the gross estate (as a item 64 on Schedule F, Other Miscellaneous Property) a settlement with Marguerite Robe claim of decedent against said individual missions, in determining that the value claim was \$6,500 on the date of decedent and in failing to determine that said claim value on said date.

(7) Respondent erred in determining that should be included in the gross estate (additional item 65 on Schedule F, Other Miscellaneous Property) a claim of decedent against Donat for monies advanced, in determining the value of said claim was \$21,866.36, on the date of decedent's death, and in failing to determine that said claim had no value on said date.

(8) Respondent erred in determining that should be included in the gross estate of decedent transfers of property made during decedent's life to a trust made by decedent on January 29, 1932, in the amount of \$152,951.83, and in failing to determine that no amount should be included in the gross estate of decedent on account of transfers of property to said trust in excess of the amount of \$130,817.79, which was reported as item 1 on Schedule G of Form 706 filed by said estate.

(9) Respondent erred in including in the gross estate of decedent the value of life insurance policies transferred by decedent to the trust created by him on January 29, 1932, and mentioned

in said gross estate on account of said policies in excess of the amount of \$39,- which was reported as item 2 in Schedule m 706 filed by said estate.

Respondent erred in failing to allow as on a claim of Florence A. Selznick against in the amount of \$14,535.01.

Respondent erred in failing to allow as a a claim of Mildred Selznick against the the amount of \$27,575.00.

Respondent erred in failing to allow de- f certain Federal and state income taxes property taxes, and interest thereon, ac- cor to the date of decedent's death.

Respondent erred in failing to allow de- f certain administration expenses includ- missions of the executors, extraordinary es, expenses of preparation of the Federal ax Return and reasonable fees of tax coun- a) the preparation of the petition herein; roceedings within the Bureau of Internal prior to trial; (c) for the trial and brief- ese proceedings before the Tax Court of ed States and (d) for the representation state in any appellate court proceedings y eventuate.

Respondent erred in failing to allow a or the amount of estate, inheritance, succession taxes actually paid or payable

of property of the decedent included in estate.

(15) Respondent erred in determining there is any deficiency and in failing to determine an overpayment.

5. The facts upon which the estate rests the basis of this proceeding are as follows:

(1) With respect to the assignment set forth in paragraph 4 (1) the facts are:

(a) On the date of his death, decedent Myron Selznick, owned 100 shares of the capital stock of Myron Selznick, Ltd., a New York corporation engaged in the business of acting as agent for artists and directors.

(b) The capital stock of Myron Selznick, Ltd. was never at any time listed on any stock exchange and was never at any time traded in the market or otherwise sold or exchanged. The 100 shares of stock of said corporation owned by decedent represented all the outstanding shares of said corporation.

(c) The value of said shares on the date of decedent's death was not in excess of \$125.00 per share or a total value for the 100 shares of \$12,500. Said shares were valued at said amount in item 22, Schedule B of Form 706 filed with the estate.

(d) In his final determination of the deficiency, respondent valued said shares at \$39,958.34.

On the date of his death, decedent owned shares of the capital stock of United Studios, a Delaware corporation, engaged in the business of holding real property and collecting rents thereon.

The capital stock of United Studios, Inc., was never at any time listed on any stock exchange and was never at any time traded in over the counter or otherwise regularly sold or exchanged. The value of said shares of United Studios, at the date of decedent's death was not in excess of \$6 per share or \$6,000 for the 1,000 shares owned by the decedent. Said shares were valued at that amount in item 25 of Schedule B of Form 706 filed by the estate.

In his final determination of the asserted value, respondent valued said shares of stock at \$6,000.

With respect to the assignment of error set forth in sub-paragraph 4 (3) the facts are:

Prior to his death, decedent had for many years acted as agent for actors, actresses, producers, directors and others engaged in the picture industry and in the entertainment industry generally, by obtaining for them employment, negotiating their relations with their employers and otherwise assisting them in their professional activities.

In this capacity, decedent had entered into numerous contracts with a large number of such individuals, by the terms of which he was entitled to

by a percentage of the compensation of such individuals.

(b) On the date of the death of the decedent there were unpaid amounts totalling \$79,330 accrued and payable to decedent as commissions for services theretofore rendered by decedent under such agency contracts then in effect.

(c) As of the date of decedent's death, the collection under said agency contracts of any amounts in addition to the amounts accrued and payable on said date was wholly contingent and uncertain, and it was not possible to determine on said date whether further amounts, if any, might be collected under. As of said date said agency contracts did not represent an asset of the estate (to the extent in excess of the amounts accrued and payable on said date) which could have been sold.

(d) On the date of decedent's death, the total value of claims of decedent under such agency contracts was not in excess of the sum of \$79,330 representing the amounts accrued on said date for commissions previously earned. Said value on the date of said commissions was reported in item 54 of Schedule F of Form 706 filed by the estate.

(e) In his final determination of the estate tax deficiency, respondent valued said claims of decedent under agency contracts at \$271,590.

(4) With respect to the assignment of the proceeds set forth in sub-paragraph 4 (4) the facts are

(a) On September 30, 1940, decedent

Hayward, Inc., a New York corporation,
Hayward and Co., Ltd., a California cor-
leeward Royalties, Inc., a California cor-
Nat Deverich and Hayward-Deverich, a
a corporation, were parties of the second

Under said contract, decedent transferred
parties of the second part certain agency
and received in exchange therefor a right
tion of the commissions derived by the
f the second part therefrom, payable if, as
n such commissions were received by the
f the second part.

s of the date of decedent's death, there
ued and payable to decedent under said
the sum of \$2,186.67.

s of the date of decedent's death, the col-
nder said contract of any amounts in addi-
ne sum accrued and payable on said date
ly contingent and uncertain and it was not
to determine on said date what further
if any, might be collected thereunder.

he value of the claim of decedent under
ract on the date of decedent's death was
which amount was reported in item 55
ule F of Form 706 filed by the estate.

n his final determination of the asserted
y, respondent valued said claim of decedent
d contract at \$9,594.77.

With respect to the assignment of errors set

employed by Hunt Stromberg, a motion picture director, to advise and assist in the organization and operation of an independent motion picture production enterprise, being organized by Hunt Stromberg.

(b) In 1942, said employment was reduced to writing in an agency contract whereby Hunt Stromberg was employed by Hunt Stromberg as agent to receive as commission 10% of the stock of the corporation formed to carry on said enterprise, 10% of Stromberg's compensation from said enterprise, only if, as and when such compensation should be received by Stromberg from said enterprise for his personal use.

(c) As of the date of decedent's death, no dispute had arisen between Stromberg and decedent as to said agency contract and Stromberg was asserting that decedent was entitled to the amounts thereunder. Furthermore, after decedent's death, Stromberg asserted that said death terminated the agency contract and all of his obligations thereunder.

(d) As of the date of decedent's death, the collection of any amounts under said contract by Hunt Stromberg was wholly contingent and uncertain and the claim of decedent thereunder had not matured.

(e) In his final determination of the deficiency, respondent valued decedent's claim against Hunt Stromberg at \$200,000.

(6) With respect to the assignment of

an agency contract with Marguerite Roberts by he represented said individual as prior to said date, decedent had determined as not receiving the amounts due to him and agency contract and had brought an action against Marguerite Roberts in the Superior Court of the State of California in and for the County of Los Angeles for damages for breach of contract.

Said action was pending on the date of decedent's death and was then and had theretofore been contested by the defendant, Marguerite Roberts, and no recovery therein had been obtained.

After decedent's death, the executors of the estate asserted the claim against Marguerite Roberts in the sum of \$6,500 paid to the estate in settlement of said claim.

At the date of decedent's death, the collection of any amounts from Marguerite Roberts was contingent and uncertain and said claim against Marguerite Roberts had no value.

In his final determination of the asserted claim, the respondent valued decedent's claim against Marguerite Roberts at \$6,500.

With respect to the assignment of error set forth in sub-paragraph 4 (7) the facts are:

In the year 1940, Robert Donat, a British actor, was a client of Myron Selznick (Selznick) Ltd., an agency controlled by the

(b) During the summer of 1940, decedent asked to advance to Robert Donat funds for support, in the United States, of Mrs. Donat and her children, because they had no funds in the United States. Decedent agreed thus to advance funds because he desired to retain the services of Robert Donat as a client of his London office and because he believed that Donat might come to the United States in which event he would employ decedent as agent in the United States.

(c) During the period between August 1940 and the summer of 1943, decedent advanced to Robert Donat sums totalling \$21,886.36.

(d) During the period between August 1940 and the summer of 1943, decedent had requested repayment in any form of the amounts advanced to Mrs. Donat, and inquired as to when he might expect to be reimbursed for the sums advanced. Decedent received no satisfactory answer from Robert Donat and, thereupon, ceased making further payments.

(e) Between 1940 and the present time, Robert Donat has never been in the United States and neither he nor his wife have any property in the United States. As of the date of decedent's death, no amount had been collected on account of the sums advanced to Mrs. Donat, and no acknowledgment of the obligation therefor had been obtained from Mr. or Mrs. Donat.

(f) The executors of decedent's estate

the obligation. The executors have been
that it would be illegal for Robert Donat
an indebtedness outside of England ex-
e amount of funds which he could have
emitted outside of England.

of the date of decedent's death, said
not enforceable and not collectible and
ue.

his final determination of the asserted
respondent valued decedent's claim
Robert Donat at \$21,886.36.

with respect to the assignment of error
in sub-paragraph 4 (8) the facts are:

January 29, 1932, decedent made a dec-
f trust as trustor and named therein
National Trust and Savings Bank of Los
national banking association, as trustee
trust was designated as Citizens' National
Savings Bank Trust #6969.

rior to June 6, 1932, decedent made trans-
pperty to said trust, which property as of
f decedent's death had a value of \$152,-

the terms of said trust, decedent re-
right to receive in monthly payments
of the property transferred to said trust
led that none of the income of said prop-
ne period between the last such monthly
and the date of decedent's death was to
ed by decedent or by his estate but

(d) Said transfers made to said trust June 6, 1932, were not transfers intended to take effect in possession or enjoyment at death and were not transfers under which decedent retained for his life or any period not ending before his death the possession or enjoyment of the income from, said property.

(e) After June 6, 1932, decedent made transfers of property to said trust which had a value as of the date of decedent's death of \$130,817.79, which amount is conceded to be includible in the estate (and of which all was reported as includible in the estate on Schedule G of Form 706 filed by the decedent).

(f) None of the transfers of property to said trust in excess of the amount of \$130,817.79 referred to in sub-paragraph (e) above are included in the gross estate of decedent.

(g) In his final determination of the deficiency, respondent included in the gross estate of decedent the property having a value as of the date of decedent's death of \$152,951.83 and \$130,817.79 referred to in sub-paragraphs (b) and (c) above, respectively.

(9) With respect to the assignment of income set forth in sub-paragraph 4 (9) the facts are as follows:

(a) On January 29, 1932, decedent made a declaration of trust as trustor (as heretofore stated in paragraph 5 (8) (a)), naming Citicorp National Trust and Savings Bank of Los Angeles as

on or about January 29, 1932, decedent transferred by assignment to said trust certain insurance policies on his life. Said policies are listed on Schedule G of Form 706 filed by the estate.

After the transfer of said policies to the trust, the amounts receivable thereunder as interest were receivable by said trustee and this continued at all times after said transfers and until decedent's death was made to the trustee under said policies until decedent's death.

Said transfers of insurance policies made prior to June 6, 1932, were not transferred to take effect in possession or enjoyment after decedent's death and were not transfers in which decedent retained for his life or any period ending before his death the possession or enjoyment of, or the income from said property.

At no time after January 10, 1941, did decedent possess any incident of ownership in the proceeds of the policies thus transferred to said trust.

The total amount received by said trustee from the proceeds under said policies was \$188,275.31 of which a proportion equivalent to the proportion of the total premiums for such insurance paid on or before January 10, 1941, was \$148,805.10 and a proportion equivalent to the proportion of total premiums for such insurance paid after January 10, 1941, was \$39,470.21.

The said amount received by said trustee as

(h) None of the amount received by said decedent as insurance under said policies, in excess of the amount of \$39,470.21 referred to in sub-paragraph (f) above, is includible in the gross estate of said decedent.

(i) In his final determination of the deficiency, respondent included in the gross estate of decedent said amount of \$39,470.21 referred to in sub-paragraphs (f) and (h) above and in addition included therein the additional amount of \$148,805.10 referred to in sub-paragraph (g) on account of said insurance.

(10) With respect to the assignment of the income set forth in sub-paragraph 4 (10) the facts are as follows:

(a) Florence A. Selznick was the mother of decedent and of his brother, David O. Selznick, commencing prior to 1936 and at all times thereafter. Florence A. Selznick was without funds and was unable to provide support for herself.

(b) Prior to 1936 decedent and David O. Selznick agreed to provide for the support of Florence A. Selznick by paying for said purpose \$100.00 weekly. Said agreement was made in view of the respective obligations to support Florence A. Selznick as provided in California Civil Code Section 206.

(c) Commencing in 1936, the weekly payments made by decedent for the support of Florence A. Selznick were made by the segregation of the income of decedent by means of accounting and the payment of the same to Florence A. Selznick.

id funds were at all times held for the Florence A. Selznick and decedent had no right, title or interest therein. From me, amounts were withdrawn from said ly by or for the benefit of Florence A.

the date of decedent's death, there re-said funds the sum of \$14,535.01 which et been expended by or on behalf of Flor-elznick.

a said date, the segregation of said funds nt represented a transaction completed ne date of death of decedent whereby the Florence A. Selznick therein became fully d said segregation did not constitute an contract.

e agreement of decedent to transfer funds ce A. Selznick by means of segregating bona fide and was in consideration of his to support Florence A. Selznick and of ment of David O. Selznick to discharge his of support by providing similar sums for rt of Florence A. Selznick which agree- esented adequate and full consideration or money's worth.

rence A. Selznick filed a claim against for the amount transferred to her by de- 4,535.01, which claim was on June 6, 1944, nd approved by the Superior Court of f Calif. in and for the Court of

estate, and the amount of said claim was
Florence A. Selznick by the estate on June

(h) The claim of Florence A. Selznick
said estate for \$14,535.01 was properly all
a deduction from the value of the gross e
reported in item 4 of Schedule K of Form
by said estate).

(i) In his final determination of the
deficiency, respondent did not allow said
Florence A. Selznick as a deduction from
of the gross estate.

(11) With respect to the assignment
set forth in sub-paragraph 4 (11) the fac

(a) In February, 1943, Mildred Selznick
and for many years had been the wife of
Selznick, a brother of decedent and David
nick. In said month, Mildred Selznick co
an action against decedent and David O.
in the Superior Court of the State of C
in and for the County of Los Angeles.

(b) In said action, Mildred Selznick
two claims against decedent and David O.
as follows:

(i) A claim for damages for breach of a
which she alleged to have been made wi
decedent and David O. Selznick by the
which she alleged that she had surren
right to obtain a divorce from Howard
and had rendered services in caring for h
change for the alleged agreement of dec

ch living accommodations for herself for
her natural life and for her children
reached their majority, and in addition
least \$75 per week and provide financial
her so long as she should live.

aim in tort for alleged deceit on the part
and David O. Selznick in inducing her
her claims and rights against Howard
hen decedent and David O. Selznick had
n of carrying out the contract alleged
n made with her.

action in the Superior Court was re-
ecedent and was pending at the date of
Thereafter it was vigorously resisted
te. Ultimately, prior to a trial of said
in March, 1945, the executors of dece-
ce and David O. Selznick agreed with
lznick upon a compromise settlement of
e claims in said action in the Superior
ne payment to her of money and prop-
at \$55,150.00 of which the estate's share
.00

l compromise settlement was submitted
erior Court of the State of California
the County of Los Angeles in a special
in the probate of decedent's estate. In
proceedings, on May 1, 1945, the Su-
rt approved the compromise settlement
d and approved the claim of Mildred

(e) The claims of Mildred Selznick that were (i) as to the claim based upon the contract, contracted bona fide and for an and full consideration in money or money and, (ii) as to the claim in tort for alleged represented an alleged liability imposed by of the State of California and arising out of decedent. The amount paid in settlement of claims represented an allowable deduction of value of the gross estate (as reported in of Schedule K of Form 706 filed by the estate).

(f) In his final determination of the deficiency, respondent did not allow said Mildred Selznick as a deduction from the the gross estate.

(12) With respect to the assignment of forth in sub-paragraph 4 (12) the facts

Prior to the final determination of Federal tax liability, decedent's estate will have paid items of the character described in the assignment of error in paragraph 4 (12) of this petition. Items are properly deductible in the final determination of the net estate.

(13) With respect to the assignment of forth in sub-paragraph 4 (13) the facts

Prior to the final determination of Federal tax liability, decedent's estate will have further liability for items of the character described in the assignment of error in paragraph

th respect to the assignment of error set
b-paragraph 4 (14) the facts are:

the final determination of Federal estate
y of decedent's estate certain items of
e character described in the assignment
paragraph 4 (14) of this petition will
paid or be payable. Decedent's estate
tled to an appropriate credit therefor.

rron Selznick, hereinbefore referred to
edent, was born on October 5, 1898, in
Pennsylvania and died a resident of
lls, California, on March 23, 1944. His
ing administered under the laws of the
alifornia.

re, petitioner prays that this Court de-
at there is no deficiency in estate tax;
contrary there has heretofore occurred
ment of Federal estate tax; that the
emine as a part of its decision that the
payment was paid within three years be-
ailing of the deficiency notice, or in the
any further payment should be made,
urther payment was made after the mail-
notice of deficiency; and grant such other
r relief as may be equitable in the

/s/ JOSEPH D. BRADY,
/s/ WALTER L. NOSSAMAN,
/s/ LUCIEN W. SHAW,

State of California,

County of Los Angeles—ss.

H. M. Bardt, being first duly sworn, sa
is Vice President and Trust Officer of
America National Trust and Savings Ass
national banking association, which is
duly appointed and acting Executors (v
O. Selznick and Charles H. Sachs), of
of Myron Selznick, deceased, petitioner h
affiant is duly authorized to verify the
petition; that affiant has read the foreg
tion, is familiar with the statements
therein and that the facts stated are true
to those facts stated to be upon inform
belief and those facts he believes to be

/s/ H. M. BARDT

Subscribed and sworn to before me this
of June, 1947.

[Seal] /s/ JULIA M. FITZSIM
Notary Public in and for the County of
geles, State of California.

My Commission Expires February 17

EXHIBIT A

Treasury Department
Internal Revenue Service
417 South Hill Street
Los Angeles 13, California

Mar. 27, 1947.

Internal Revenue Agent in Charge,
es Division, LA:ET:90D:NAB

Myron Selznick, Deceased
America National Trust and
ssociation et al, Executors
Beverly Drive
ills, California

e advised that the determination of the
liability of the above-named estate, dis-
eficiency of \$384,634.05, as shown in the
attached.

rdance with the provisions of existing in-
venue laws, notice is hereby given of the
or deficiencies mentioned.

90 days (not counting Saturday, Sunday
holiday in the District of Columbia as
ay) from the date of the mailing of this
may file a petition with the Tax Court
ted States, at its principal address, Wash-
D. C., for a redetermination of the de-

requested to execute the enclosed form
ward it to the Internal Revenue Agent in
Los Angeles, California, for the attention
Conf. The signing and filing of this form
pedite the closing of your return (x) by
ting an early assessment of the deficiency
ciencies, and will prevent the accumulation
est, since the interest period terminates
after filing the form, or on the date asse
made, whichever is earlier.

Very truly yours,

JOSEPH D. NUNAN, J.
Commissioner.

By GEORGE D. MARTIN,
Internal Revenue A
in Charge.

Enclosures:

Statement

Form of waiver

LA:ET.90D:NAB
District of Sixth California
Estate of Myron Selznick

Date of Death: March 23, 1944

Statement

	Liability	Assessed
Estate Tax	\$678,733.97	\$294,099.92

In making this determination of the federal estate
of the above-named estate, careful consideration has
to the report of examination dated June 28, 1946, to
dated November 8, 1946, and to the statements r
hearing on January 20, 1947.

A copy of this letter and statement has been m

to net estate:

Basic tax as disclosed		
Return		\$ 974,850.04
Value of net estate and		
deductions:		
Bonds	\$ 33,365.84	
Miscellaneous property	428,848.84	
Stocks	301,848.37	
Insurance commissions	3,500.00	
Attorney's fees	17,446.37	
Decedent	42,110.01	827,119.43
		<u>1,801,969.47</u>

Value of net estate and		
deductions:		
Expenses	\$ 154.10	
Business administration		
Costs	7,295.44	7,449.54
		<u>1,794,519.93</u>
Basic tax as adjusted		\$1,794,519.93
Additional tax as		<u>1,834,519.93</u>

Explanation of Adjustments:		
	Returned	Determined
Bonds	\$ 12,592.50	\$ 39,958.34
	6,000.00	12,000.00
	<u>18,592.50</u>	<u>\$ 51,958.34</u>
		\$ 33,365.84

Adjusted values of \$399.58 per share for stock of Myron
(N.Y.) and of \$12.00 per share for stock of United
are predicated upon consideration of all relevant
elements of value disclosed by the evidence on file,
information being given to corporate earning and dividend
policy.

	\$ 79,390.42	\$ 271,590.21
	2,186.67	9,594.77
	0	200,000.00
60—S.A.G. dues	0	625.00
61—Return prem.		
Employment tax	0	96.59
62—Return prem.		
D.	0	44.01
63—Refund of costs		

\$ 81,577.09 \$

Difference

The determined value of item 54 is predicated upon amount collected to March 26, 1946, plus one-half undistributed balances. See exhibit A accompanying 30-day details.

The determined value of item 55 is predicated upon amount collected. See exhibit B accompanying 30-day details.

The determined value of item 59 is based on the amount that would have been received by the estate if the tract with Hunt Stromberg had been terminated at the death and an accounting had of moneys and property.

Additional items 60, 61 and 62 are refunds received from the estate of dues and premiums paid prior to date of death.

Additional item 63 is a refund of costs received by the estate from Mr. Brannen in connection with the Pastor's death in 1941.

Additional item 64 is the amount received by the estate in settlement in full with Marguerite Roberts on accrued interest January 29, 1942 and March 23, 1944.

Additional item 65 is the amount owing to the estate at the date of death by Robert Donat and it is included at the value because it has not been shown that this claim was of no value.

Transfers during decedent's life:

The value of the following described property, transferred during the life of the decedent in his lifetime, is included in the gross estate because it is being determined that such transfer was intended to take effect at the death of the decedent in possession or enjoyment at decedent's death and covered by the provisions of section 811(c) of the Internal Revenue Code.

Item 1	\$ 130,788.98	\$
Item 2	39,407.58	
Funeral expenses	5,649.90	
Difference		

Funeral expenses are allowed in the amount paid for the same as shown by the evidence on file.

Executors' commissions	\$ 40,000.00	\$
Difference		

Executors' commissions are allowed in the total amount allowed by the Court and paid to date as shown by the evidence on file as follows:

f America N.T. & S.A.:
 r 29, 1944, on account
 tory commissions, \$7,-
 cember 28, 1945, com-
 allowed by the Court
 ordinary services, \$20,-
 otal, \$27,500.00.

s H. Sachs: December
 on account of statutory
 ons, \$2,500.00; Janu-
 1945, commissions al-
 the Court for extraor-
 services, \$6,500.00; total,

al of commissions paid,	\$36,500.00		
fees	\$ 75,000.00	\$	57,553.63
			17,446.37

fees are allowed in the total amount allowed by
 d paid to date as shown by the evidence on file, as
 mber 21, 1944, extraordinary fees, \$6,500.00; Janu-
 on account of statutory fees, \$5,000.00; December
 ra fees, \$20,000.00; March 14, 1946, extra fees, \$22,-
 h 14, 1946, on account of statutory fees, \$3,500.00;
 .63.

administration expenses:

.....	\$ 1,000.00	\$	1,295.44
Item 16. Arbitration			
Andy Devine	0		2,000.00
Item 17, Attorney fees			
arker, Milliken & Kohl-			
account	0		5,000.00
	<hr/>		<hr/>
	\$ 1,000.00	\$	8,295.44
			7,295.44

he amount paid to White & Case for attorney fees
 is allowed in lieu of the amount claimed as esti-
 e.

a expenses paid to the S.A.G. is allowed as Addi-
 6 and the amount paid on account to special tax
 owed as additional Item 17.

dent:

.....	\$ 14,535.01	0
.....	27,575.00	0
	<hr/>	<hr/>

	Computation of	Estate Tax
	Returned	Determined
Gross estate for basic tax	\$1,392,173.45	\$2,156,236.50
Deductions	417,323.41	361,716.57
Net estate for basic tax	\$ 974,850.04	\$1,794,519.93
Net estate for additional tax	\$1,014,850.04	\$1,834,519.93
Gross basic tax		\$ 115,006.79
Credit for estate and inheritance tax		0
Net basic tax.....		\$
Total gross taxes (basic and additional)	\$ 678,733.97	
Gross basic tax.....	115,006.79	
Net additional tax		
Total net basic and additional taxes		\$
Total tax payable		\$
Estate tax assessed:		
July 1945 list, page 102, line 3		
Deficiency		\$

Upon receipt of a waiver, or upon the expiration from the date of this letter, if a petition is not filed with the Tax Court of the United States, \$292,628.62 of the deficiency will be assessed.

As the balance of the deficiency may be eliminated by the filing of a petition for State estate, inheritance, legacy, or succession tax, a reasonable opportunity will be accorded for the submission of the evidence required by section 81.9 of Regulations 105. If after a reasonable time the evidence is not filed, the balance of the deficiency will be assessed. Please advise when the credit evidence is expected.

Received and filed June 23, 1947. T.C.U.S.

[Title of Court and Cause.]

ANSWER

1 Revenue, for answer to the petition of
-named taxpayer, admits and denies as

2. Admits the allegations contained in
s 1 and 2 of the petition.

Admits that the taxes in controversy are estate
that the asserted deficiency is in the
\$384,634.05 as alleged in paragraph 3 of
n and denies the remainder of said para-

(15), inclusive. Denies that the respond-
as alleged in subparagraphs (1) to (15),
of paragraph 4 of the petition.

. Admits the matter set forth in sub-
(a) of paragraph 5(1) of the petition
lack of information sufficient to form
to the truth or falsity thereof it is denied
n Selznick, Ltd., a New York corpora-
engaged in the business of acting as agent
and directors as alleged in said subpara-

denies the allegations contained in sub-
(b) of paragraph 5(1) of the petition.
Admits that 100 shares of Myron Selznick,
valued at \$12,592.50 in item 22, Sched-
Form 706 filed by the estate as alleged in
aph (c) of paragraph 5(1) of the peti-
denies the remainder of said subpara-

paragraph (a) of paragraph 5(2) of the petition except for lack of information sufficient to form a belief as to the truth or falsity thereof it is alleged that United Studios, Inc., was a Delaware corporation engaged in the business of holding real property and collecting rents therefrom as alleged in said subparagraph.

(b). Denies the allegations contained in paragraph (b) of paragraph 5(2) of the petition.

(c.) Admits that 1,000 shares of United Studios, Inc., were valued at \$6,000 in item 25 of Schedule of Form 706 filed by the estate as alleged in paragraph (c) of paragraph 5(2) of the petition and denies the remainder of said subparagraph.

(d). Admits the allegations contained in paragraph (d) of paragraph 5(2) of the petition.

5(3)(a) and (b). Admits the allegations contained in subparagraphs (a) and (b) of paragraph 5(3) of the petition.

(c). Denies the allegations contained in paragraph (c) of paragraph 5(3) of the petition.

(d). Admits that \$79,390.42 on account of commissions was reported in item 54, Schedule of Form 706 filed by the estate as alleged in paragraph (d) of paragraph 5(3) of the petition and denies the remainder of said subparagraph.

(e). Admits the allegations contained in paragraph (e) of paragraph 5(3) of the petition and 5(4) (a) to (d), inclusive. Denies the

chedule F of Form 706 filed by the estate as
subparagraph (e) of paragraph 5(4) of
on and denies the remainder of said sub-
n.

admits the allegations contained in sub-
n (f) of paragraph 5(4) of the petition.

to (d), inclusive. Denies the allegations
in subparagraphs (a) to (d), inclusive,
aph 5(5) of the petition.

admits the allegations contained in sub-
n (e) of paragraph 5(5) of the petition.

. Admits the allegations contained in
aph (a) of paragraph 5(6) of the petition.

denies the allegations contained in sub-
n (b) of paragraph 5(6) of the petition.

admits the allegations contained in sub-
n (c) of paragraph 5(6) of the petition.

denies the allegations contained in sub-
n (d) of paragraph 5(6) of the petition.

admits the allegations contained in sub-
n (e) of paragraph 5(6) of the petition.

and (b). Denies the allegations con-
subparagraphs (a) and (b) of paragraph
e petition.

admits the allegations contained in sub-
n (c) of paragraph 5(7) of the petition.

denies the allegations contained in subpara-
of paragraph 5(7) of the petition.

admits that as of the date of decedent's

graph (e) of paragraph 5(7) of the petition denies the remainder of said subparagraph.

(f) and (g). Denies the allegations in subparagraphs (f) and (g) of paragraph the petition.

(h). Admits the allegations contained paragraph (h) of paragraph 5(7) of the

5(8)(a). Admits the allegations contained subparagraph (a) of paragraph 5(8) of the petition.

(b). Admits the matter set forth in paragraph (b) of paragraph 5(8) of the petition the qualification "prior to June 6, 1932," denied.

(c) and (d). Denies the allegations in subparagraphs (c) and (d) of paragraph the petition.

(e). Admits the matter set forth in paragraph (e) of paragraph 5(8) of the petition except the qualification "after June 6, 1932" is denied.

(f). Denies the allegations contained paragraph (f) of paragraph 5(8) of the

(g). Admits that in his final determination the asserted deficiency, respondent included gross estate of decedent the property value as of the date of decedent's death 769.62 as alleged in subparagraph (g) of paragraph 5(8) of the petition and denies the remainder of said subparagraph.

admits the matter set forth in subparagraph of paragraph 5(9) of the petition except of information sufficient to form a belief truth or falsity thereof denies that the were made "on or about January 29, alleged in said subparagraph.

f), inclusive. Denies the allegations contained in subparagraphs (c) to (f), inclusive, of 5(9) of the petition.

admits that \$39,407.58 was reported as includible in the estate in Schedule G of filed by the estate as alleged in subparagraph of paragraph 5(9) of the petition and remainder of said subparagraph.

denies the allegations contained in subparagraph (h) of paragraph 5(9) of the petition.

admits that in his final determination of deficiency, respondent included in the estate of decedent \$188,275.31 on account of advance as alleged in subparagraph (i) of 5(9) of the petition and denies the remainder of said subparagraph.

) to (h), inclusive. Denies the allegations contained in subparagraphs (a) to (h), inclusive, of paragraph 5(10) of the petition.

admits the allegations contained in subparagraph of paragraph 5(10) of the petition.

) to (e), inclusive. Denies the allegations contained in subparagraphs (a) to (e), inclusive, of paragraph 5(11) of the petition.

5(12), (13) and (14). Denies the allegations contained in paragraphs 5(12), (13) and (14) of the petition.

5(15). Admits the allegations contained in paragraph 5(15) of the petition.

6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ CHARLES OLIPHANT

Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

B. H. NEBLETT,

Division Counsel.

E. A. TONJES,

H. A. MELVILLE,

Special Attorneys, Bureau of
Internal Revenue.

Received and filed Aug. 19, 1947, T.C.U.

[Title of Court and Cause.]

STIPULATION

It is hereby stipulated and agreed by the parties to the above-entitled proceeding by their respective counsel, as follows:

respect to disposition of the issues set
Petition as paragraph 4, subparagraphs
(3), (4), (5), (6), (7), (10), (11), (12),
(14). These are set forth below in para-
mbered to correspond with said sub-
of paragraph 4 of the Petition, the
and agreements of the parties with
these issues.

by stipulated and agreed that the Court
follows:

value of 100 shares owned by decedent
stock of Myron Selznick, Ltd., a New
Corporation, was \$26,000 on the date of death
of decedent.

value of 1000 shares owned by the de-
capital stock of United Studios, Inc., a
Corporation, was \$6,800 on the date of de-
ath.

value of commissions payable by cli-
decedent represented as agent, referred
to in 54 in the statement accompanying the
Petition, on the date of decedent's death
was \$4,000.

value of the claim of decedent for com-
pensation receivable under a contract between Myron
Selznick and Myron Selznick, Inc., parties of the
Petition and Leland Hayward, Leland Hayward,
Leland Hayward Co., Ltd., Leeward Royalties,
Deverich and Hayward-Deverich, par-

(5) The value of the claim of decedent's commissions under an agency contract with Stromberg, was \$20,000 on the date of death.

(6) The value of a claim of decedent's Marguerite Roberts for commissions was the date of decedent's death.

(7) A claim of decedent against Robert for moneys advanced, on the date of death had no value.

(10) A claim of Florence A. Selznick of the decedent's estate in the amount of \$27,000 is not an allowable deduction for Federal estate tax purposes.

(11) A claim of Mildred Selznick of the decedent's estate in the amount of \$27,000 is allowable as a deduction for Federal estate tax purposes in the amount of \$20,681.

(12) and (13) Federal and State income and State property taxes and interest thereon accrued prior to the date of decedent's death and administration expenses incurred by the decedent, claimed in the estate tax return nor allowed in the 90-Day Letter, are properly deductible in the amount of \$33,589.79. In addition, if the following circumstances occur, further fees of counsel in this proceeding shall be allowed as an additional deduction as follows:

If an appeal from this proceeding to the United States Circuit Court of Appeals is taken by either

party thereafter applies for a writ of
to the Supreme Court of the United
further deduction for such fees of \$1,000
owed, upon proof of payment of same.

a writ of certiorari is granted, a further
for such fees of \$2,500 shall be allowed,
of payment of same.

h respect to this proceeding, the Peti-
incurred or will incur other costs and
nd the amount thereof (not exceeding
le amount), if properly established by
ner, will be allowed as a deduction in any
n made herein pursuant to Rule 50.

nder the provisions of Section 813(b) of
l Revenue Code, as amended by Section
Revenue Act of 1939, and limited by
6(a) of the Internal Revenue Code, a
state inheritance taxes in the amount
or by law shall be allowed to the peti-
time prior to sixty days after the deci-
Tax Court herein becomes final, if proof
is established in accordance with the
of Section 81.9 of Regulations 105.

tion of Facts with Respect to Issues
9 as to Which the Parties Are Still in
e.

ies hereby submit to the Court for its
e issues set forth in subparagraphs (8)
f paragraph 4 of the Petition. It is

1. On January 29, 1932, the decedent executed a Declaration of Trust naming the Colonial Trust and Savings Bank of Louisiana as trustee and said Bank accepted said Declaration to it as Trust Number 6969. A Declaration of Trust is attached hereto as 1-A.

2. The decedent transferred assets to said trust as follows:

a. On January 29, 1932, decedent transferred to the trust, assets (other than life insurance contracts) having a value on the date of decedent's death of \$152,951.83. After June 6, 1932, decedent transferred to said trust, assets (other than life insurance contracts) having a value on the date of decedent's death of \$130,817.00. In addition, it is stipulated and agreed, inasmuch as said amount is properly includible in decedent's gross estate (and which represents \$28.81 more than the amount reported in the estate tax return on which said assets).

b. Decedent also transferred to said trust, life insurance contracts owned by him, copies of which are filed herewith as Exhibits, as follows:

Policy Number	Name of Issuing Insurance Company	Amount
4,330,590	Mutual Life Insurance Company.....	\$
10,484,859	New York Life Insurance Company..	\$
10,484,860	New York Life Insurance Company..	\$
10,541,918	New York Life Insurance Company..	\$
62,036	Peoples Life Insurance Company.....	\$
63,287	Peoples Life Insurance Company.....	\$
108328-R	Indianapolis Life Insurance Co.....	\$

ent executed by decedent on the dates said instruments and delivered by decedent's trustee on said dates. The total proceeds of life insurance contracts, as of the date of decedent's death, were \$188,275.31, of which the amount allocable to premiums paid prior to January 1, 1941, was \$148,805.10, and the portion allocable to premiums paid after said date was \$39,470.21. In which latter sum, it is stipulated and agreed that, in any event, includible in decedent's estate (and which represent \$62.63 more than was reported in the estate tax return on account of said insurance).

Set forth in the Declaration of Trust (Exhibit 11-K), Article VII), the net income of said trust is to be paid to Myron Selznick. Attached as Exhibit 11-K is a statement showing the amounts of all payments made by the trustee under said trust to Myron Selznick, from the date of creation of the trust to the date of decedent's death. On the date of decedent's death there was on hand \$36 of income of said trust on hand with which the estate which had accrued and which had not been distributed to the decedent.

It is hereby stipulated and agreed that, notwithstanding the decision of the Court with respect to the estate as shown below, the amounts includible in the estate on account thereof will be as fol-

includible in gross estate, the amount in gross estate on account of said trust (which is \$91.44 more than the amount in account thereof in the estate tax return)

b. If the Court finds that the non-insurance assets transferred to the trust prior to June 6, 1932, are not includible in gross estate but the insurance contracts transferred to the trust prior to June 6, 1932, are includible in gross estate, then the amount includible in gross estate on account of said trust is \$319,093.10.

c. If the Court finds that all of the assets transferred by decedent to said trust (including non-insurance assets and insurance contracts) are includible in gross estate, the amount in gross estate on account thereof is \$472,041.10.

Dated November 29, 1948.

/s/ LUCIEN W. SHAW,
Counsel for Petitioner

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of Internal Revenue
Counsel for Respondent.

Filed Nov. 29, 1948. T.C.U.S.

EXHIBIT 1-A

s National Trust & Savings Bank

Trust No. 6969

Declaration Of Trust

1 Men By These Presents: That the
tional Bank of Los Angeles, a national
ociation, with its principal office at Los
lifornia, hereinafter called Trustee, does
it, certify and declare that Myron Selz-
dent of Beverly Hills, California, here-
ed Trustor, has conveyed, transferred
ed to the said Trustee the sum of One
ousand and (\$100,000.00) Dollars lawful
ne United States, hereinafter sometimes
as "money and/or securities"; that in
ereto, the said Trustor has assigned to
Trustee, as Trustee, certain insurance
schedule of which is attached hereto,
hibit "A", and by this reference made
of as if herein fully set forth.

eed that no consideration was given by
e for the delivery to it of said sum of
or said securities, and that the same has
ived and accepted by it and will be here-
y it in trust, under the terms and con-
forth in this Declaration, and that the
any and all of said policies of insurance.
any other policies upon the life of the

ing uses and purposes, and subject to the
and reservations and upon the trusts
to-wit:

Article I.

It is an express condition of this trust
Trustee shall not be responsible nor as
liability for the nature, value or extent
to any sum of money, securities or other
accepted In Trust hereunder, or any secu
or other property that may hereafter be
to it and added to this trust, as hereinafter
nor for any adverse or conflicting claims
therein of other persons, nor for the valu
or collectibility of any securities or note
paper received by it; but that its only lia
be for such right, title and interest as it
received or hereafter acquire under an
ances, assignments and transfers, and for
as it may collect from any property rece

Article II.

The Trustor agrees that as to the
policies delivered to the Trustee or which
after be delivered to it:

To cause each and every policy inter
made subject to this agreement and
hereunder to be made payable to the
sufficient designation as beneficiary ther
such other manner as the parties heret
insurer shall agree, and the Trustee a

agreement by which any policy shall
able to it.

Article III.

tee is authorized and empowered to re-
d, subject to the provisions hereof, said
ney and securities, and also any addi-
rty and/or securities the Trustor may
o time add to the principal of this trust,
of the trust estate and not at the risk
ee, and without liability for decrease in
f such property or securities. Said
ereby given full power of sale and ex-
nnection with the property and securi-
ne to time comprising the principal of
nd is authorized and empowered from
, subject to the restrictions hereinafter
invest, reinvest, loan and reloan the pro-
sh principal in any securities, properties
ents permissible by law for investment
ds, and upon such terms and conditions
Trustee may deem to be for the best in-
is trust; said Trustee to use reasonable
o protect all persons interested in this
oss by reason of such loans or invest-

ne lifetime of the Trustor, Myron
sale or exchange of property which may
comprise the principal of the trust

Trustee except on the written order and of said Trustor or his duly authorized agent. The said Trustor during his lifetime hereby releases himself and/or his agent to be designated from time to time, the right to direct, in whole or in part, the Trustee as to the investment of all cash and property in any securities and/or property whether or not the same may be approved and permitted by law for investment of trust funds under the laws of the State of California. After the death of the said Trustor, the said Trustee shall only sell, exchange, or reinvest in securities permissible by law for investment of trust funds as above provided without the written approval of any two of the Trustees, David O. Selznick and Loyd Wright, and upon the written request of either the said David O. Selznick or Loyd Wright, then upon the approval of the said Trustor or them; and/or if all of the above named Trustees should have previously died and/or neglected to act within a reasonable time after the request of said Trustee, then in the absence of the same, in the uncontrolled discretion of said Trustee. The said Trustor shall be fully protected in respect of any changes, investments and reinvestments made or directed by the Trustor and/or the said David O. Selznick and Loyd Wright, and it shall not be liable or responsible in any way for damages or loss incurred by reason of any such changes, investments or reinvestments made or standing anything herein to be com-

pus or said trust estate in any security written by the said Trustee, or in which Trustee is directly or indirectly interested. Trustor hereby reserves the right by written instrument filed with the Trustee, to revoke said instrument of David O. Selznick and/or Loyd Selznick to substitute other persons to act for Trustor of David O. Selznick and/or Loyd Selznick in the capacities herein in this paragraph and to permit them to act.

Trustee may, if it so elects, cause any and all shares of corporate stock, now or that may hereafter be subject to this trust, to be transferred to the Trustee, as Trustee under its instrument of 1969, and either name the beneficiaries in said instrument, certificate and/or furnish said corporate stock with the names of the beneficiaries and/or a copy of the Declaration of Trust; or hold the corporate stock in this trust without transfer to Trustor, and/or it may hold the same in the name of Trustor and/or the name of the bene-

fits accruing on shares of the capital stock of a corporation which form a part of the trust estate and payable in shares of the corporation, shall be deemed principal. Trustee shall have the option of receiving dividend either in cash or in shares of the corporation, it shall be considered

choice made by the Trustee. All rights to the shares or other securities or obligations of such corporation accruing on account of the ownership of shares in such corporation and the exercise of any such rights, shall be deemed to be sold by any sale of such rights, shall be deemed to be sold.

Said Trustee is directed to charge all expenses of the trust on investments and to credit all discounts and interest on investments against or to principal, as the Trustee may determine, and not against or to income. In all matters relating to the said Trustee is hereby vested with absolute and uncontrolled discretion and power to determine what shall constitute principal of the trust estate, and what shall constitute gross income therefrom, or net income available for distribution under the terms of this trust. The Trustee may also, at its discretion, and subject to the obtaining the consent of the Trustor, if living, or if said David O. Selznick and Loyd Wright be dead, or if they be dead, then in its discretion, to invest, alone, improve any real property subject to the trust, build, alter, or repair any improvements thereon, of such character, amount, cost, and nature as the Trustee may deem advisable.

Said Trustee may loan or advance its money or property to the trust estate, for any trust purpose, and may fix the rates of interest, which loan or advance shall thereupon become a first lien on the assets of the trust estate as to both principal and interest, and shall be repaid to said Trustee before any other distribution of income or principal.

Article IV.

Trustee hereunder shall resign under the conditions set forth herein, and to do which it hereby expressly reserves for itself and its successor or successors in office, the right to appoint a Trustee shall be appointed by any court of competent jurisdiction in the County of Los Angeles, California, acting upon or in response to a petition of the resigning Trustee and/or the surviving Trustee, and/or any beneficiary.

Article V.

Trusts hereunder created and declared shall be subject to the following conditions and agree-

ments, to the extent that it shall be deemed necessary by the Trustee to disclose the contents of this agreement to any insurance or other company or to any person for any purpose of the trust, or in connection with any proceedings in any court of competent jurisdiction to enforce any of the provisions of this agreement or to appoint another Trustee, or in any controversy affecting this trust, the provisions of Section 103 of the Probate Code of the State of California and any similar provisions hereafter enacted or declared.

Any provision of this agreement shall be void if held invalid, such invalidity shall be without effect upon the other provisions hereof, and each provision of this agreement hereunder shall be deemed separate and distinct from any

passing of any interest in the trust estate paid out of the principal of the taxable interest. All other taxes payable shall be of principal and charged by the Trustee in its discretion it deems fair and equitable.

(d) Whenever the trust estate or any part thereof shall be distributable, the Trustee in its discretion, may transfer and deliver to the beneficiary in the form in which then held in the trust estate, securities and investments at the market value thereof equivalent in amount to the distributable share or interest, or may convert the trust estate or any part thereof into cash for distribution.

(e) In all matters of interpretation, construction, necessary to give effect to any provision of this agreement, the masculine shall include the feminine and the singular shall include the plural.

(f) This trust has been created, declared and accepted by the Trustee in the State of New York and shall be interpreted and enforced in accordance with the laws of said State.

(g) The terms "policy" and "policy of insurance," whenever used in this agreement shall include all forms of insurance upon the life of the Trustor, including accident insurance payable upon the event of his death.

(h) Each and every beneficiary of the trust hereunder created and declared, including the Trustor, shall have no right, title or interest in the trust estate or any part thereof.

ir, or encumber his or her beneficial
al interest in the trust estate, and no in-
of attempted assignment, transfer, or
on thereof shall be effective for any pur-
ever, and neither the principal nor the
the trust estate, nor any part thereof,
ble for the debts of any beneficiary nor
to attachment, execution or other process
t.

s agreed that the Trustee shall not be
for any act or omission hereunder unless
itutes gross negligence, nor shall it be
bring or defend suit hereunder, unless
to its own satisfaction.

shall be the duty of every beneficiary to
Trustee is directed to make payment or
of any kind hereunder to notify the
the happening of the event or events
uch beneficiary becomes entitled to re-
and to furnish reasonable proof thereof.
e Trustor warrants, represents and states
solvent and that there are no judgments
, and that he has created this irrevocable
ut intent to hinder, delay or defraud any
at, in so far as the provisions hereof may
at the income shall be payable to the
shall, for the purposes of the provisions
laration of Trust and as to said income,
and construed a beneficiary.

estate or from the principal thereof, if the income is insufficient, the Trustee shall first pay, out of the income, charge, as and when due, any and all taxes, assessments, advancements and other expenses of every kind and nature expended or incurred in the management and protection of the trust estate of this trust, and the payment when due of the same, and all income taxes, inheritance taxes and other taxes levied or assessed upon the trust estate, and the beneficiaries hereunder or the income therefrom, and shall, after sufficient cash or other assets have been deposited in this trust so that the income therefrom shall be sufficient, (until such time as the Trustor agrees to pay said premiums himself) pay any and all premiums on life insurance policies and/or contracts which may be transferred to or delivered by the Trustor to the Trustee for its use to the terms hereof, and also pay to itself compensation for its own services as Trustee, as follows:

(a) A sum equal to one-tenth of one per cent (1/10th of 1%) of the reasonable value of the estate for the acceptance of this Declaration of Trust and other instruments in relation hereto, and a like sum for any additions that may be made to the principal of this trust. Minimum Twenty-Five Dollars (\$25.00).

(b) An annual compensation, payable quarterly, equal to three-fifths of one per cent ($3/5$ of 1%) of the reasonable value of the principal of the estate, for its ordinary and usual duties.

sum equal to one per cent (1%) of the value of the principal of the trust estate at the termination, distribution, closing and settlement of the trust according to the terms hereof. The Trustee shall pay reasonable compensation for any unusual or extraordinary services rendered by it as Trustee and the amount to be fixed by court.

Article VII.

This trust is irrevocable. The entire net income and profits derived from the trust estate and available for distribution hereunder shall be by said Trustee paid monthly or in other convenient installments as directed by the Trustor to Myron Selznick during his lifetime; the said Myron Selznick, who reserves the right to direct the Trustee from time to time to credit, keep and add any and all income which, pursuant to the terms hereof, may be paid to him, to the principal of the corpus of the trust estate, by giving written instructions from time to time as so demanding.

Article VIII.

After the death of the said Myron Selznick the entire net income received or derived from the trust estate and available for distribution shall go and be paid by said Trustee in monthly installments, as follows: As long as the net distributable income remains in the corpus of the trust estate does not

1. One-half ($\frac{1}{2}$) of the net income shall be paid to the widow of the Trustor, if living at the issue of the body of the Trustor survive and share alike. In this connection, the guardian surviving of the issue of the body of the Trustor shall, during the minority of any child, receive the share herein provided to be paid to the issue during his or her minority.

2. Of the remaining one-half ($\frac{1}{2}$) of the net income, for and during the lifetime of the Trustor and father of the Trustor, Fifty Per cent of said remaining one-half shall be paid in monthly installments to each of L. J. Seligman, father of Trustor, and Florence A. Seligman, mother of Trustor, and upon the death of both of them the survivor of the said father and mother of the Trustor shall receive, during his or her lifetime, all of the one-half of the net income herein provided in sub-paragraph 2 referred to. The Trustor has no provision herein for his brother David and his brother Howard and his family, during the lifetime of either his father and/or mother, for the reason that he has full faith and confidence in the fact that his mother and father will should necessity arise, as they have always done, amply provide for the support of David and the said Howard and his family from the moneys they receive from this trust.

Upon the death of the last survivor of the Trustor, mother and father of the Trustor, the one-half of the net income referred to in

0%) Per Cent thereof to David O. Selznick, Trustor, and the remaining fifty per cent to Howard Selznick, the brother, and the children of Howard Selznick, share alike, subject to the following conditions to Howard Selznick, as long as he shall live, and to the children of Howard Selznick as long as they shall remain single, during the life of this Trust, and if any child of Howard Selznick marry, such child shall be entitled to receive his share of said income for one year thereafter the expiration of one year from the date of such child's marriage, he or she shall have an interest in the income, as provided in Paragraph. The share of the net income to be paid to the surviving children of the said Howard Selznick, during their minority, at all times shall be paid to the guardian of the estate of each of them. When and as each of the children of Howard Selznick marry, she or he shall be entitled to the Trustee Twenty Five Hundred Dollars, from the principal of the trust estate, which shall be charged against that portion of the principal from which Howard Selznick and his children receive their share of the net income of the corpus of the trust. (In this connection, Trustor states that Howard, at the date of the execution of this Trust, has two children, Ruth Selznick and

in contemplation of the fact that said Howard Selznick may have other issue of his body.)

death of the said Howard Selznick, or a child or children, the income to which the one so surviving would be entitled, if living, shall, during the lifetime of the survivor or survivors, (subject to the qualifications hereinafter set forth), be paid to such survivor or survivors. In this connection, notwithstanding anything herein in this deed to the contrary, the children of the said Howard Selznick, upon marriage, shall be entitled to receive their share of the income herein provided to be paid them, for one year after his or her marriage only, and upon the termination of such one year period, that portion otherwise provided to be paid to such child as shall have married, shall be distributed to the said Howard Selznick and/or his children of his children who may then survive and/or be married, and upon the expiration of the said one year period for the last of said children of the said Selznick who may marry, and upon the death of the said Howard Selznick, or upon the death of the last survivor of the said Howard Selznick and/or his children should they not marry, or any of them should they marry, the income herein provided to be paid to the said Howard Selznick and/or his children shall be paid to the widow of the Trustor, if she survives; if not, to the daughter of the Trustor, Jean Selznick, and/or if he leaves more than one issue of his body to his issue (including Jean Selznick).

death of the said David O. Selznick, that the net income hereinbefore provided to him shall likewise be payable to the said Trustor, and if she does not survive the O. Selznick, then to the child or children Trustor, share and share alike, if there an one.

and after the death of the widow of the she survives him, and/or if she predeceases the Trustor, then upon the Trustor's death, one-third of the net income of the corpus of the trust (and balance of income of the corpus of the trust estate if she then be receiving or be entitled to the same pursuant to the terms hereof), shall be payable to Joan Selznick, daughter of the Trustor, if there be more than one issue of the Trustor surviving, then to his issue share and share alike, until the death of the last surviving of David O. Selznick, Howard Selznick, L. Selznick, Florence A. Selznick, Ruth Selznick, and upon the death of the last surviving of them the trust shall cease and the principal and undistributed income shall be payable as follows:

(a) To the issue of the body of Myron Trustor, share and share alike, and to the issue of any deceased issue per stirpes and by right of representation.

(b) If there be no such issue as referred to in the foregoing sub-paragraph 2, to the issue of the named charitable institutions, to-wit: L. J. Selznick Orthopedic Hospital for Children.

The Trustor reserves the right to change or substitute, from time to time, the said charitable institutions, by giving notice of such change to the Trustee in writing.

Notwithstanding anything herein to the contrary, if and in the event the said Trustor dies leaving surviving a widow, and in the event of the death of Selznick and any other issue of the body of the said Selznick shall predecease David O. Selznick, Howard Selznick and/or Ruth and Florence Selznick, and the said Joan or other issue of the said Selznick leave no issue, then the net income from the said trust estate shall be distributed and paid as follows:

(a) The whole of the net income shall be paid to L. J. Selznick and Florence A. Selznick, share and share alike, or the survivor of them for their lifetime.

(b) Upon their death, and so long as the said Selznick survives, Fifty (\$50.00) Dollars shall be paid to each of said Howard Selznick and his issue, share and share alike and the balance of the net income shall be paid to the said Joan or other issue of the said Selznick, share and share alike.

On the death of Howard, if David survives (\$50.00) Dollars per week to each of the living children of Howard Selznick, during his or her life, subject to the qualification, however, that if any of the children of Howard Selznick survives, then the share of the income received by the child or children as does marry shall only for a period of one year after his or her marriage; thereafter the portion of the income to which the child or children would otherwise have been entitled shall go to David O. Selznick, and it is further, that the balance and remainder of the income, after deducting the Fifty (\$50.00) Dollars payments to Howard and the survivors of him, subject to the foregoing qualifications, shall go and be paid to David O. Selznick, if he survives them.

On the death of David O. Selznick predeceases them, the income shall be payable to the said Howard Selznick, his children, or the survivor of them, share equally, alike, during their lifetime, and upon the death of the last of the survivor of Howard Selznick and his children the trust shall cease and the principal and undistributed income of the trust estate shall be made payable and the Trustee be transferred, set aside, and the same to the following named charitable institution: Los Angeles Orthopedic Hospital.

tutions, by giving notice of such change of distribution to the Trustee in writing.

Notwithstanding anything herein to the contrary, if and in the event the net income from the trust estate exceeds an average of Fifteen Thousand (\$15,000.00) Dollars per year, but does not exceed Thirty Thousand (\$30,000.00) Dollars per year, then and in such event the foregoing provisions shall be changed in the following particulars, and in no others, to-wit:

The children of Howard Selznick shall each receive upon their marriage Five Thousand (\$5,000.00) Dollars instead and in lieu of Twenty Five Hundred (\$2,500.00) Dollars each, and they shall also receive Fifty (\$50.00) Dollars per week if the net income hereinbefore provided for exceeds the amount under such circumstances and at the times when they are hereinbefore provided to receive their portion of said net income. Notwithstanding anything herein to the contrary, the surplus over and above an average annual income of Thirty Thousand (\$30,000.00) Dollars per annum derived from the trust estate and all such surplus shall be distributed as follows:

(a) To the widow of the Trustor, for her life and for her lifetime.

(b) Upon her death, to Joan Selznick, if she survives, and other issue of the body of Mr. Selznick, if any there be and if any survive, and should she die or to the issue of such child

here be no widow of the Trustor survive the issue of the Trustor shall die without issue, then said surplus shall be paid to L. J. and Florence A. Selznick, father and mother respectively, of the Trustor, if living, or survivor of them, and thereafter to the said David O. Selznick, if living, and upon his death to be accumulated and added to the principal of the trust estate.

Article IX.

Notwithstanding anything herein to the contrary, in the event of the death of the Trustor, his intention, desire, and the Trustor hereby directs that if and in the event, and under any circumstances, his legal wife survives him as his widow, and after his death she should remarry, that all income herein provided to be paid to her shall be divided and she shall receive one-half thereof of the moneys, (either income or principal) and as, pursuant to the terms hereof, she is entitled to receive the same, and the remainder of such principal and/or income herein provided to be paid her shall be paid to her and distributed in the same manner as is here- provided in the event the wife of the Trustor shall have predeceased the Trustor.

Article X.

The Trustor declares that he is married; that his wife is Maria J. Selznick, and that the

Selznick. Trustor wishes to provide, how makes this Declaration of Trust in con of the fact that there may be more than of his body, and for that reason has throu instrument made provision for the said Jo of her interest herein with any other is body, share and share alike.

Article XI.

Notwithstanding the fact that this Dec Trust is irrevocable, the Trustor, for h on behalf of the beneficiaries, reserves t petition any court of competent jurisdic time and from time to time to amend a strue the same; provided, however, that ment shall change the provisions of this t shall have the effect or which is intended cause the same to be construed to be or a be a revocable trust rather than an irrev

The Trustor reserves the absolute righ or cause to be cancelled, and revoke or c revoked, any of the insurance policies ferred to, or which may hereafter be ad Trust, provided that he first obtain the w sent of any two of the following, to Trustee, David O. Selznick and Loyd W vided further, that upon any cancellation surrender values received on any such po remain in and/or be added to the corp Trust.

Article XII.

standing anything herein to the contrary, shall terminate upon the death of the last of the Trustor, Marjorie Daw Selznick, Selznick, David O. Selznick, Howard Selznick, Selznick, father of the Trustor, Florence A. Selznick, mother of the Trustor, and Ruth and Florence Selznick, nieces of the Trustor, all of whom survive, and the trust estate distributed as herein provided.

Article XIII.

Income accrued or undistributed at the termination of any trust or estate hereunder, shall go to the beneficiary or beneficiaries of the next eventual estate, in the same proportion as the principal hereof, provided, however, on express condition of the trust herein which shall take precedence over any and all provisions herein relative to the distribution of the trust estate, that the Trustee is authorized and empowered and may in its sole and absolute discretion, although it is not obligated so to do, to pay out of the net income and/or principal of the trust in such manner as to it may seem equitable, to pay a reasonable sum toward the expenses of the illness and of the funeral of the Trustor, and to pay specifically named or contingent bene-

Wherever in this agreement it is provided that the Trustee shall cease making payment to any beneficiary upon the happening of any contingency such as marriage or otherwise, it shall not be the Trustee or responsible by making payment pursuant to the terms of this trust to any beneficiary or any person interested in this trust, until notified in writing and due proof satisfactory to the Trustee of the happening of such contingency as pursuant to the terms hereof operates to change the payment theretofore in effect.

In Witness Whereof, said Citizens National Trust & Savings Bank of Los Angeles, has caused its corporate name to be subscribed hereunto, its corporate seal to be affixed hereunto by its President and Assistant Trust Officer duly authorized, this 29 day of January 1911, at Los Angeles, California.

CITIZENS NATIONAL
& SAVINGS BANK
LOS ANGELES, as Trustee

By HALCOTT B. THOMAS
Vice-President.

VICTOR T. JOHNSON
Assistant Trust Officer

I, the Undersigned, Myron Selznick, do hereby certify that I am the person named in the foregoing Declaration of Trust, and that the same is true and correct.

st is irrevocable; that said Declaration
ly and accurately sets out the terms and
r and upon which the property therein
s to be held, managed and disposed of
stee therein named, and I do hereby
nt to, approve, ratify and confirm the
particulars.

Los Angeles, California, this 29 day of
32.

MYRON SELZNICK,
Trustor.

dersigned, Marjorie Daw Selznick, wife
elznick, the Trustor in the above and
eclaration of Trust, having read said
of Trust in its entirety and clearly
ng the same, do hereby accept the terms
ns of said trust, and I do hereby ratify,
d confirm the same, and that I, by this
do, pursuant to my right to contract,
quish and forever quitclaim any and all
and to the moneys and securities de-
hereafter to be deposited by the said
nick in said Trust, and/or other prop-
rties, including insurance agreements,
paid thereon, as well as the proceeds
en and as collected, and that each, all
of the moneys, property, securities, in-
icies, and the proceeds thereof, I do

be constituted as a waiver of any right
may have by reason of the terms and conditions of the
said Trust, if any.

Dated at Los Angeles, California, this
January, 1932.

MARJORIE DAWSON

EXHIBIT "A"

No. 192324

The Indianapolis Life Insurance
Company of Indianapolis, Indiana

No. 62036

Peoples Life Insurance Company.

No. 63287

Peoples Life Insurance Company.

No. 10484859

New York Life Insurance Company

No. 10484860

New York Life Insurance Company

No. 4330590

The Mutual Life Insurance Com
pany of New York

No. 10541918

New York Life Insurance Company

Policies taken out since the above ex
made out

No. 109395

The Indianapolis Life Insurance
Company of Indianapolis, Indiana

EXHIBIT 11-K

f Payments of Net Income to Myron
 from Trust Number 6969, made by
 National Trust and Savings Bank of
 eles as Trustee.

	Amount of Payment
.....	\$ 431.34
1933	1589.04
33	1624.21
, 1933	811.03
1933	819.47
1934	146.97
4	2410.62
934	1422.41
, 1934	1334.95
1934	1262.59
1934	459.22
1935	2448.77
35	716.00
.....	1879.53
935	2376.99
, 1935	544.65
1935	436.68
1935	1571.99
1936	23.98
1936	714.90
.....	480.00
.....	100.00

September 3, 1936
September 21, 1936
October 7, 1936
November 6, 1936
January 9, 1937
February 5, 1937
March 3, 1937
May 5, 1937
July 6, 1937
August 6, 1937
September 3, 1937
April 11, 1940
June 5, 1940
November 8, 1940
March 18, 1942

Tax Court of the United States

Docket No. 14985

OF MYRON SELZNICK, Deceased,
OF AMERICA NATIONAL TRUST
SAVINGS ASSOCIATION, DAVID O.
ICK and CHARLES H. SACHS, Ex-

Petitioners, -

vs.

ONER OF INTERNAL REVENUE,
Respondent.

erty transferred to a trust under which
estate in the income was reserved to
or is includible in the gross estate of
donor under section 811 (c), I.R.C.
s L. Church, . . . U.S. . . . (January 17,

. SHAW, ESQ.,
Petitioners.

ES, ESQ.,
respondent.

MEMORANDUM OPINION

Judge.

ndent determined a deficiency in estate
634.05 consequent upon his holding,

The parties entered into an extensive stipulation by which numerous issues were disposed of. The stipulation is incorporated herein by reference and adopted as formal findings of fact. Efforts have been given to such stipulations in the recomputation of the estate tax subsequent hereon. The following facts were stipulated or appear from the pleadings:

Bank of America National Trust and Savings Association, a national banking association organized under the laws of the United States, Selznick and Charles H. Sachs are the trustees appointed and acting executors of the last will and testament of Myron Selznick, who died on January 23, 1944.

The Federal estate tax return of the estate of the decedent was duly filed with the collector of internal revenue for the sixth district of California on June 22, 1945, and the sum of \$294,099.95 was paid to said collector on said date as Federal estate tax of said estate.

On January 29, 1932, the decedent executed a declaration of Trust naming the Citizen's Savings Trust and Savings Bank of Los Angeles as trustee, and said bank accepted said trust, referred to herein as Trust No. 6969.

Article VII of the trust agreement reads as follows:

This Trust is irrevocable. The entire income received and derived from the trust property and available for distribution hereunder shall be paid to the surviving spouse of the decedent for life.

nick for and during his lifetime; the Selznick, however, reserves the right to remove the Trustee from time to time to credit, and any and all income which, pursuant to the terms hereof, may be payable to him, to the credit of the corpus of the trust estate, by giving such instructions from time to time so de-

reads as follows:

Notwithstanding the fact that this Declaration of Trust is irrevocable, the Trustor, for himself and on behalf of the beneficiaries, reserves the right to petition any court of competent jurisdiction at any time and from time to time to amend or modify the same; provided, however, that no such amendment shall change the provisions of this Declaration which shall have the effect or which is intended to shall cause the same to be construed as a trust and intend it to be a revocable trust rather than a non-revocable one.

The Trustor reserves the absolute right to cancel or cause to be cancelled, and revoke or cause to be revoked, any of the insurance policies herein provided for or which may hereafter be added to the trust; provided that he first obtain the written consent of any two of the following, to wit: David O. Selznick and Loyd Wright; and further, that upon any cancellation any cash values received on any such poli-

The decedent transferred assets to said trust, as follows:

On January 29, 1932, decedent transferred to said trust, assets (other than life insurance contracts) having a value on the date of decedent's death of \$152,951.83. After June 6, 1932, decedent transferred to said trust, assets (other than life insurance contracts) having a value on the date of decedent's death of \$130,817.79, which amount was stipulated and agreed, in any event is includible in decedent's gross estate (and represents \$28.81 more than the amount included on the estate tax return on account of such transfers).

Decedent also transferred to said trust, life insurance contracts owned by him, as follows:

Policy Number 4,330,590, Mutual Life Insurance Company, \$25,000.

Policy Number 10,484,869, New York Life Insurance Company, \$25,000.

Policy Number 10,484,860, New York Life Insurance Company, \$25,000.

Policy Number 10,541,918, New York Life Insurance Company, \$50,000.

Policy Number 62,036, Peoples Life Insurance Company, \$25,000.

Policy Number 63,287 Peoples Life Insurance Company, \$5,000.

Policy Number 108,328-R, Indianapolis Life Insurance Company, \$10,000.

Policy Number 102,224, Indianapolis Life Insurance Company, \$10,000.

Number 109,395, Indianapolis Life Insurance Company, \$5,000.

to the life insurance contracts are true instruments of assignment executed by on the dates shown on such instruments red by him to the trustee on such dates. proceeds of said life insurance contracts, ate of decedent's death, were \$188,275.31, he portion allocable to premiums paid nuary 10, 1941 was \$148,805.10, and the ocable to premiums paid after said date 0.21, which latter sum, it is stipulated, is in any event, includible in decedent's e (and which represent \$62.63 more than reported in the estate tax return on ac- id insurance).

th in the Declaration of Trust, the net said trust was to be paid to Myron Selznick thereto is a statement showing the amounts of all payments made by the der said trust to Myron Selznick, from creation of the trust to the date of death. On the date of decedent's death \$1,138.36 of income of said trust on hand trustee which had accrued and which had distributed to the decedent.

so stipulated if the Court finds that all ts transferred by decedent to said trust both non-insurance assets and insurance

On the above facts and others appearing in the stipulation and exhibits, petitioners contend that none of the assets transferred to the trust should be included in the taxable estate.

The brief was filed but a few days before the Supreme Court rendered its decision in *Commissioner v. Estate of Francois L. Church, Deceased* (January 17, 1949). In that case the Court overruled *May v. Heiner*, 281 U.S. 213, *Hassett v. Welch*, 303 U.S. 303, and ruled on issues closely paralleling in all substantial respects the issues here present that the reservation of life interest was a decisive factor. The Court said:

***We hold that this trust agreement, which reserved a life income in the trust property, was intended to take effect in possession or enjoyment after the settlor's death and that the Commissioner's decision was properly affirmed. The value of the trust property was properly included in the value of the estate.

No useful purpose will be served by discussing the various technical and legalistic arguments advanced by petitioners in view of the effect thereon of the Church case. Result affirmed.

Decision will be entered under Rule 50.

Served April 1, 1949.

Entered April 1, 1949.

[Seal T.C.U.S.]

court and Cause.]

TO WITHDRAW MEMORANDUM
ON AND TO PERMIT FILING
PETITIONERS' SUPPLEMENTARY
F

Now the petitioners by their attorneys
Cossaman and Joseph D. Brady, Walter
an and Lucien W. Shaw, and respect-
est that the court enter the following

memorandum opinion herein entered
1949, be withdrawn and that the peti-
plementary brief to analyze the Church
submitted herewith) be filed.

Reasons therefor petitioners respectfully
to the court as follows:

Petitioners' Opening Brief was filed on or
January 10, 1949, within the time directed by
the trial of the case on November 29,

February 2, 1949 this Court granted a
respondent for extension of time within
the brief. Included in said motion as one
ground therefor was the following state-

Supreme Court of the United States
Opinions promulgated January 17, 1949,
Commissioner of Internal Revenue v. Estate of
Church, Deceased, Edward F. Black

Spiegel et al v. Commissioner of Internal Revenue, decided questions which in all probability will have a material bearing on the decision in this case. The petitioner and respondent desires to give the opportunity of the decisions in these cases careful consideration which consideration cannot be given in the time remaining before the due date of the briefs.

3. Petitioners therefore assumed that their case would be considered in connection with the Church case and that the appropriate time for petitioners to present to the Court their views thereon was afforded in petitioners' reply brief to respondent's brief referred to in said motion.

4. Respondent has never filed a brief in this case before petitioners were able to submit their supplementary brief to analyze the Church decision. The memorandum opinion herein was received after the filing of petitioners' brief.

5. Petitioners respectfully submit that the Church decision in the Church case has no application to this case. The reasons for this conclusion are set forth in the supplementary brief accompanying this motion. The Court should have the opportunity to consider petitioners' argument on this matter before a decision is entered herein.

Wherefore, it is prayed that the foregoing be made by the court.

Dated: April 11, 1949.

/s/ JOSEPH D. BRADY,

/s/ WALTER L. NOSSAM

States Tax Court Stamp]: Denied April

/s/ ERNEST H. VAN FOSSAN,
Judge.

and Filed April 13, 1949 T.C.U.S.

court and Cause.]

FOR REVIEW BY THE COURT
REPORT OF A DIVISION

Presiding Judge Of The Tax Court Of the
States:

rs respectfully pray that the Presiding
eise the discretion conferred on him by
(b) I.R.C. and direct that the Memorandum
entered in the above proceeding on
49 be set aside and that the matter be
the entire court.

issue, in this case is whether a trust
January 29, 1932 is includible in gross
Federal estate tax purposes. This issue
ends upon whether the trust is taxable
grantor reserved income of the trust
ending before his death.

tion for review is based upon the follow-
s:

tioners, through no fault of their own,
ed no opportunity whatsoever to present

basis for the Memorandum Opinion of the Court entered April 1, 1949.

(2) The Memorandum Opinion of the Court entered April 1, 1949 is erroneously based on the citation of the decision in the Church v. Board of Christian Workers (January 17, 1949; 93 Law Ed. Adv. 100), which case actually has no relationship to the present case.

1. Petitioners Given no Opportunity to Present Arguments on Basis of Memorandum Opinion

In accordance with the order of the Court in the trial, the petitioners' opening brief was filed on or about January 10, 1949.

Seven days later, on January 17th, the Court entered its decision in the Church v. Board of Christian Workers. Petitioners were aware that the Church decision might be thought to have some bearing on this case. This was confirmed by respondent's Motion for Extension of Time to File Brief (granted by the Court on February 2, 1949). This Motion was based on the plea that the Church decision rendered would have some bearing on the present case.

Petitioners' counsel promptly analyzed the Church decision. They reached the conclusion that the decision was not applicable and had no bearing upon this case and could not be used as a precedent decision against the petitioners. They prepared a draft of language for a brief to demonstrate this point long before the decision was rendered by the Division herein.

this argument on the Church case was in
ef to respondent's brief. At the date of
Division had ordered respondent to file a
had ordered petitioners to file a reply
seemed presumptuous for petitioners'
file a further interim brief not directed
rt when there was no need to do so. The
reply brief was the proper occasion for
s point.

rs received no brief of the respondent
it was due and attempted, without suc-
gh the Clerk of the Court to find out

rs were therefore astounded, shortly
1, 1949, to receive the Memorandum
the Division, deciding the case solely in
the Church decision. The Church de-
nothing to do with this case and peti-
been ready, able and willing to demon-
conclusion for over a month before the
m Opinion was entered. The opportu-
so was wholly denied to them through
poration between the respondent (who
knew it was unnecessary for him to file
d the Division which entered this Mem-
Opinion without giving petitioners the
ortunity to be heard on this question.

rs therefore respectfully urge that they
d the opportunity to be heard on the

guilty of no fault or negligence whatsoever merely because they adhered to the procedure of this Court instead of volunteering a brief on a question arising after their opening brief.

Since this issue involves a tax of over 100% plus interest, the petitioners feel that they have thus been deprived of a fair hearing on an important matter by this Court.

It is therefore respectfully requested that the Presiding Judge set aside this arbitrary and capricious Opinion and have this case considered by the entire Court where petitioners' arguments can be the sole point relied upon in the Division's decision may be examined.

2. Church Case has no Application Herein

The Memorandum Opinion of the Division rendered April 1, 1949, relies solely upon the facts of the Church case. Neither the facts nor the decision in the Church case have any application herein.

The statute applicable to this case is Section 302(c), as amended by the Joint Resolution of March 3, 1931 (quoted in our opening brief on page 16 and in our supplementary brief on page 17).

As amended by the Joint Resolution of March 3, 1931, the statute provided for taxing a transfer of property thereafter if the decedent reserved the right to the income for life. Under this 1931 amendment the statute had been applicable which it was not applicable

trust in the present case decedent re-
himself the right to income to be "paid
in other convenient installments as di-
the trustor." (Exhibit 1-A, Article VII,
page 26 of our opening brief.) The trust
provided that the accrued and undistrib-
e of the trust at decedent's death should
d go to the beneficiary or beneficiaries
the next eventual estate." (Exhibit 1-A,
II, quoted on page 26 of our opening
erscoring supplied.)

ention from the beginning of this case
at this was not a trust with income re-
life. It was a trust with income reserved
period ending on the date of the last pay-
installment of income prior to deced-
, which is not a right to income for life.
ad been a trust with income reserved for
s unquestionably taxable under the ap-
tute—the Joint Resolution of March 3,
e is no question about this—there was no
out it from the beginning of this case
rior to January 17, 1949, the date of the
the Church case.

rch case involved a trust created in 1924
ne decedent reserved the net income of
'during the term of his natural life.'
nothing in the Church trust limiting the
of income to any period ending before

Revenue Act of 1924) provided only for transfers "intended to take effect in possession or enjoyment at or after his death." The Court, therefore, in the Church case, was holding that in this language the reservation of a full life estate made the trust taxable. If the Church trust had been created after the Joint Resolution of March 3, 1931, it would clearly have been taxable and there would have been no occasion to take the case to the Supreme Court of the United States.

The Church decision thus merely established the law prior to March 3, 1931 to be the same as the law now. The way has been clear since March 3, 1931, namely, a trust with full life estate reserved to the settlor is not taxable. We have never argued in this case that this was not the law after March 3, 1931.

What we have argued is that the Settlor here did not create a full life estate. The Settlor herein did not retain the right to the income of the trust for life but for a period ending at his death. We have argued and still argue that this prevents the trust from being taxable under the present law which taxes only trusts where the settlor's income is reserved for life. The Church decision has nothing to this rule of law in our case, for it was a trust after March 3, 1931. Therefore, the Church decision stands wholly unaffected by the Church case which merely extended back the rule applicable to trusts created after March 3, 1931.

The Congress in 1932 made a further

is here involved. (Section 302(c), as amended by the Revenue Act of 1932, effective January 1, 1932.) That this was the exact purpose of the amendment appears from both House and Senate reports. (House of Representatives Report No. 708, 72d Congress, 1st Session; Senate Report No. 665, 72d Congress, 1st Session. See, C. B. Clark, *supra* note II, at pp. 490 and 532.) These Comments are quoted from in our opening brief, dated June 29, 1932, and in our supplementary brief, dated July 29, 1932. Therefore it is clear that such a trust could not be created if created before June 6, 1932.

Nothing in the Church decision to affect the facts in this case. The Church decision is based upon a different set of facts. None of the facts in the Church opinion deals with taxability of the decedent's right to income. The decedent reserves a right to income until his death ending before his death.

We therefore submit that the Memorandum Opinion is wholly in error in relying upon the Church decision as the basis for a decision herein. The Church decision has nothing to do with this situation. The decision herein can be based only upon a detailed analysis of the provisions of the trust and the law applicable thereto, as was done in our opening brief.

Reasons why the Church decision is not applicable herein appear more fully in our Supplementary Brief to Analyze Church Decision, filed July 29, 1932.

with the Court on April 13, 1949, which
sion refused to consider.

It is therefore respectfully urged that
orandum Opinion of the Division is in
that this proceeding should be reviewed
tire Court.

Dated: April 21, 1949.

/s/ JOSEPH D. BRADY,

/s/ WALTER L. NOSSAM

/s/ LUCIEN W. SHAW,

Attorneys for Petiti

[U.S. Tax Court Stamp]: Denied April

/s/ BOLON B. TURNER,

Presiding Judge.

Received and filed April 25, 1949 T.C.U

[Title of Court and Cause.]

RESPONDENT'S COMPUTATION

ENTRY OF DECISION

The attached proposed computation is
on behalf of the respondent, to The Tax
the United States, in compliance with i
determining the issues in this proceeding

This computation is submitted in accord
the opinion of the Court, without prejud
respondent's right to contest the correctn

ered herein by the Court, pursuant to
in such cases made and provided.

/s/ CHARLES OLIPHANT,

Chief Counsel, Bureau of In-
ternal Revenue.

TEBLETT,

ION COUNSEL.

ROUTER,

ONJES,

cial Attorneys, Bureau of
nternal Revenue.

and filed May 3, 1949 T.C.U.S.

April 22, 1949.

Recomputation Statement

state of Myron Selznick, Deceased
ank of America National Trust and
Savings Association
David O. Selznick and Charles H. Sachs,
Executors
69 North Beverly Drive
everly Hills, California

Docket No. 14985

March 23, 1944.

Estate Tax Liability

Tax Assessed	Deficiency
\$294,099.92	\$199,842.44 (*)

ents shown in the attached schedules have been
alance with the memorandum opinion of The Tax
nited States, entered April 11, 1949, for decision

piration of 60 days after the decision of The Tax
United States becomes final, the deficiency of \$199
above will be reduced to \$136,822.66.

Estate of Myron Selznick

Date of Death: March 23, 1944

Recomputation Statement

Schedule 1

Adjustments to Net Estate

For
Basic Tax

Net estate as shown in statutory notice dated March 27, 1947.....	\$1,794,519.34
Net estate as adjusted.....	1,378,434.18

Adjustment (decrease)	\$ 416,085.75
-----------------------------	---------------

Reductions in value and increases
in deductions:

(a) Stocks and bonds.....	
(b) Other miscellaneous property	
(c) Transfers	
(d) Debts of decedent.....	
(e) Taxes and administration expenses.....	

Total	
-------------	--

Schedule 2

Explanation of Adjustments

	Value deter- mined in statutory notice
(a) Stocks and Bonds:	
(1) Item 22	\$ 39,958.34
(2) Item 25	12,000.00
Total	\$ 51,958.34
Difference (decrease)	

Schedule 2 (Continued)

on Selznick
March 23, 1944

Recomputation Statement

	Value deter- mined in statutory notice	Revised determination
cellaneous Property:		
.....	\$ 271,590.21	\$ 137,774.00
.....	9,594.77	5,890.72
.....	200,000.00	20,000.00
ettlement with		
s)	6,500.00	3,250.00
claim against		
nat)	21,886.36	None
.....	<u>\$ 509,571.34</u>	<u>\$ 166,914.72</u>
.....		342,656.62
during decedent's life:		
.....	\$ 283,769.62	\$ 283,769.62
.....	188,275.31	188,275.31
.....	<u>\$ 472,044.93</u>	<u>\$ 472,044.93</u>

— none

The Tax Court of the United States that "prop-
l to a trust under which the life estate in the in-
ved to the donor is includible in the gross estate
or under section 811(c) Internal Revenue Code."

Allowance as shown
in statutory notice as revised

ecedent:

.....	none	none
.....	none	\$20,681.00
.....	<u>none</u>	<u>\$20,681.00</u>
decrease)		\$20,681.00

Mildred Selznick against the decedent's estate in
\$27,575.00 is allowable as a deduction for federal
oses in the amount of \$20,681.00.

Schedule 2 (Continued)

Estate of Myron Selznick

Date of Death: March 23, 1944

Recomputation Statement

(e) Federal and state income taxes and state property and interest thereon accrued prior to the date of death, and administration expenses incurred by the estate, claimed in the estate tax return nor allowed in the return, are properly deductible in an amount of \$33,589.79.

Schedule 3

Computation of Estate Tax

Net estate for basic tax, Schedule 1..

Net estate for additional tax,

Schedule 1

Gross basic tax

Credit for estate and inheritance tax

Net basic tax

Total gross taxes (basic and

additional)\$ 493,942.36

Gross basic tax 78,774.73

Gross additional tax

Total net basic and additional taxes

Estate tax assessed:

July 1945 list, Page 102, Line 3....

Deficiency

urt and Cause.]

ION WITH RESPECT TO ENTRY DECISION UNDER RULE 50

by stipulated and agreed by the parties
-entitled proceeding by their respective
follows:

ax Court may enter its decision based
ndent's computation for entry of de-
a was filed with the Court on May 3,
parties reserving, however, the right to
correctness of such decision in the ap-
ts as provided by statute.

event that evidence of payment of State
taxes is filed before the expiration of
er the decision of the Tax Court of the
tes becomes final the deficiency of
which is computed without reference to
uch State inheritance taxes, shall be ap-
reduced.

event that proceedings are had in the
ourts, the deficiency above mentioned
uced still further in such amount as will
duction for legal fees and expenses in-
ch appellate proceedings, no deduction
ing been reflected in respondent's com-
d May 3, 1949.

spondent will, upon request, join peti-
requesting the Court of Appeals for the
it on the Supreme Court of the United

out the provisions of paragraphs 2 and
stipulation.

Dated: May 23, 1949.

/s/ JOSEPH D. BRADY,

/s/ LUCIEN W. SHAW,

Counsel for Petitioner

/s/ CHARLES OLIPHANT,

Chief Counsel, Bureau of
Internal Revenue.

Filed May 31, 1949 T.C.U.S.

[Title of Court and Cause.]

DECISION

Under written stipulation signed by
the parties in the above-entitled proceeding
filed with the Court on May 31, 1949, at
Washington, D. C., it is

Ordered and Decided: That there is
in estate tax of \$199,842.44.

[Seal] /s/ ERNEST H. VAN FOSBROOK
Judge.

Entered June 3, 1949.

Served June 3, 1949.

rt and Cause.]

ORDER AND DECISION

to the Court's Memorandum Opinion
l 1, 1949, the respondent filed a pro-
tation of tax on May 3, 1949, and a
lation signed by counsel for the parties
filed on May 31, 1949, now, therefore,

nd Decided: That the decision entered
ne 3, 1949, be and the same is hereby
set aside, and it is further

nd Decided: That there is a deficiency
of \$199,842.44.

/s/ C. R. ARUNDELL,
Judge.

ne 7, 1949.

ne 8, 1949.

In the United States Court of Appeals
For the Ninth Circuit

Tax Court Docket No. 14,985

ESTATE OF MYRON SELZNICK,
BANK OF AMERICA NATIONAL
AND SAVINGS ASSOCIATION
O. SELZNICK and CHARLES E.
Executors,

Petitioners on Petition for Review
vs.

COMMISSIONER OF INTERNAL REVENUE
Respondent on Petition for Review

PETITION FOR REVIEW

To the Honorable Judges of the United States
Court of Appeals for the Ninth Circuit

Now come Estate of Myron Selznick
Bank of America National Trust and Savings
Association, David O. Selznick and Charles E.
Executors, by Joseph D. Brady, Walter
man and Lucien W. Shaw, their attorneys,
respectfully show:

I.

Nature of Controversy

Petitioners are executors of the Estate of
Selznick who died a resident of Beverly Hills,
California, on March 23, 1944.

On January 29, 1932, said decedent

avings Bank of Los Angeles as trustee
k accepted said trust.

y 29, 1932, said decedent transferred
assets (other than life insurance con-
g a value on the date of his death of
Decedent also transferred to the trust
urance contracts owned by him. The
e proceeds of said life insurance con-
the date of decedent's death) allocable
paid prior to January 10, 1941, was

dent in his 90-Day Letter determined
ansfers to said trust by the decedent
le in gross estate for Federal estate
as transfers "intended to take effect
or enjoyment at decedent's death"
in the provisions of section 811 (c) of
Revenue Code."

have denied that said transfers were
ake effect in possession or enjoyment
'death because all of decedent's rights
other possession or enjoyment of the
ended, under the terms of the trust,
date of decedent's death. Therefore,
rge, the transfers were not includible
e under section 302(c) of the Revenue
as amended by the Joint Resolution of
1 (Public Number 131, 71st Congress),
e law applicable to these transfers, nor

Petitioners have also asserted that said transfers are not includible in gross estate under the provision of the Internal Revenue Code. The respondent did not deny before the Tax Court that the transfers were made to the decedent while he was domiciled in the United States.

The Tax Court upheld the determination of the respondent that said transfers were includible in the decedent's gross estate. In doing so it relied solely on the decision of the Supreme Court in *Commissioner v. Estate of Francois L. Church, Deceased* (354 U.S. 17, 1949), although that case involved a transfer which the decedent had reserved a right to income for life ending only at the moment of his death, whereas in this case, under the trust, the decedent's right to income ended before his death. The Tax Court gave the petitioners no opportunity to be heard on the application of the Church case to this case. That case was decided after petitioners had filed their opening brief, and the Court entered its decision without waiting for a brief from the respondents, thus permitting the petitioners to file the closing brief in which the Church case would have been discussed.)

The Tax Court erred:

1. In holding and deciding that transfers made by the decedent to said trust of \$152,951.83 (with respect to assets other than life insurance contracts) and \$148,805.10 (with respect to life insurance contracts) were includible in the decedent's gross estate for Federal estate tax purposes.

Federal estate tax based on including
ers in gross estate.

dering an opinion and decision which,
cts above enumerated, are contrary to
ng law and regulations and are not
y any evidence in the case.

II.

of Court in Which Review Is Sought
s hereby declare that they seek a re-
decision of the Tax Court of the United
e United States Court of Appeals for
rcuit.

III.

to Establish Venue and Jurisdiction
znick, the decedent herein, died a resi-
erly Hills, California, on March 23,
state is being administered under the
State of California. The petitioners
of America National Trust and Sav-
tion, a national banking association,
znick, and Charles H. Sachs, are the
ed and acting executors of the last will
nt of Myron Selznick. This case in-
ederal estate tax liability of petitioners
of said estate.

the United States Court of Appeals
a Circuit is established by the fact that

les, which collection district is within the jurisdiction of the Court of Appeals for the Ninth Circuit, and by the fact that the parties here stipulated that the decision by the Tax Court shall not be reviewed by any Court of Appeals other than the one herein designated.

The amount of the deficiency in estate tax determined by the Tax Court (prior to the allowance of any credit for State inheritance tax) was \$842.44. Said deficiency represents the amount payable as a result of inclusion in gross estate (a) certain amounts to which the parties are bound in a stipulation dated and filed with the Tax Court on November 29, 1948, and which are not in controversy, and (b) the transfers to the trust on January 29, 1932, made by decedent and his wife. As to under heading I above, the inclusion of the same in the gross estate represents the matter in controversy on this appeal.

The proceedings upon which the deficiency was determined by the Tax Court determining said deficiency were as follows: On April 1, 1949, the Tax Court promulgated its Memorandum Opinion (No. 10,000, Van Fossan), holding that said transfers to the trust, described under heading I above, were includible in gross estate. Thereafter, by stipulation, the fact that they had had no opportunity to litigate the nonapplicability of the Church decision was admitted. As to in heading I above, the petitioners filed a petition for Tax Court (1) on April 13, 1949, a Memorandum

by the Tax Court on April 14, 1949, and
April 25, 1949, a Motion for Review by the
report of a Division, which motion was
the Tax Court on April 27, 1949.

April 7, 1949, pursuant to its Memorandum
the Tax Court entered its Order and De-
there is a deficiency in estate tax of
This petition for review is for a re-
decision by the Tax Court holding that
the trust made by the decedent on Jan-
1932, in the total amounts of \$152,951.83
\$5.10 respectively are to be included in
and is filed pursuant to the provisions
1141 and 1142 of the Internal Revenue

and, Petitioners pray that the decision of
Court of the United States be reviewed by
United States Court of Appeals for the Ninth
that a transcript of the record be prepared
in accordance with the law and the rules of said
Court and be transmitted to the Clerk of said Court
and that appropriate action be taken to
correct the errors herein complained of may
be and corrected by said Court.

April 26, 1949.

/s/ JOSEPH D. BRADY,

/s/ WALTER L. NOSSAMAN,

/s/ LUCIEN W. SHAW,

Counsel for Petitioners on

Docket No. 14,985

ESTATE OF MYRON SELZNICK,
BANK OF AMERICA NATIONAL
AND SAVINGS ASSOCIATION
O. SELZNICK and CHARLES F.
Executors,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE
Respondent.

PETITIONERS' DESIGNATION
CONTENTS OF RECORD ON REVIEW

To the Clerk of the Tax Court of the
United States:

The above-designated petitioners, being
petitioners on review, hereby designate
for review in the record for consideration by the
United States Court of Appeals for the Ninth Circuit
the review of the decision of the Tax Court of the
United States entered in said proceedings on July 7,
1949, the entire record as follows:

1. The docket entries of all proceedings before
the Tax Court.
2. Pleadings before the Tax Court, including
(a) Petition, including annexed exhibits
(being a copy of deficiency letter and statement of

tion between the parties dated Novem-
and filed with the Tax Court upon said

ts to the stipulation referred to in para-
follows:

bit 1-A—Declaration of Trust. Three
pies of said Exhibit are filed herewith;
number thereof may be compared and
l included in the record.

bits 2-B, 3-C, 4-D, 5-E, 6-F, 7-G, 8-H,
J—insurance policies. Copies of said
y be included in the record, except that,
ed States Court of Appeals for the
it orders and directs the transmission
al exhibits on file with the Clerk of the
to said Court of Appeals in their orig-
for the inspection of that Court, the
a of such original exhibits shall be made
pying the same into the record.

bit 11-K—Statement of Payments of
to Myron Selznick from Trust Number
by Citizens National Trust and Savings
s Angeles as Trustee. Three duplicate
said Exhibit are filed herewith; the
ber thereof may be compared and certi-
luded in the record.

Memorandum Opinion of the Tax Court
il 1, 1949.

a to Withdraw Memorandum Opinion

1949, and order denying said motion, d
14, 1949.

7. Motion for Review by the Court of
a Division, filed April 25, 1949, and ord
said motion dated April 27, 1949.

8. Respondent's Computation for En
cision filed May 3, 1949.

9. Stipulation with respect to Entry o
Under Rule 50 filed May 31, 1949.

10. Decision entered June 3, 1949.

11. Order and Decision entered June

12. Petition for Review by the Uni
Court of Appeals for the Ninth Circuit.

13. Notice of Filing Petition for R
gether with proof of service thereof and
of a copy of the Petition for Review.

14. This Designation of Contents of
Review.

Request is hereby made that a transcr
record be prepared, certified and transmi
Clerk of the Tax Court of the United St
Clerk of the United States Court of A
the Ninth Circuit as required by law and
of said Circuit Court of Appeals.

Dated: July 26, 1949.

/s/ JOSEPH D. BRADY,

/s/ WALTER L. NOSSAM

/s/ LUCIEN W. SHAW,

Counsel for Petition

service of a copy of the foregoing Des-
hereby acknowledged as having been
st day of August, 1949.

GEORGE J. SCHOENEMAN,
Commissioner of Internal
Revenue, Respondent.

/s/ CHARLES OLIPHANT,
Chief Counsel for the Bureau
of Internal Revenue.

29, 1949 T.C.U.S.

United States Court of Appeals
For the Ninth Circuit

Tax Court Docket No. 14,985

OF MYRON SELZNICK, Deceased,
OF AMERICA NATIONAL TRUST
SAVINGS ASSOCIATION, DAVID
ZNICK and CHARLES H. SACHS,
rs,

Petitioners on Review,

vs.

ONER OF INTERNAL REVENUE,
Respondent on Review.

FOR TRANSMISSION OF ORIG-
EXHIBITS ON FILE WITH THE

of the United States Court of Appeals for the Ninth Circuit, and to the other Judges of that Court:

The above-designated petitioners on review are petitioners in a proceeding before the Tax Court of the United States, bearing docket number 10,447, in which proceeding the Tax Court rendered its decision on June 7, 1949, that there is a deficiency in federal estate tax owing by said petitioners in the amount of \$199,842.44. Petitioners have filed their petition for a review of said decision in this Court, and have filed their designation of the contents of the record on review. In said designation it is requested that there be included in said record the complete record of all the proceedings before the Tax Court of the United States in this case, with copies of exhibits, except that if the Tax Court of the United States Court of Appeals for the Ninth Circuit directs the transmission of certain of said exhibits, namely, Exhibits 2-B, 3-C, 4-D, 5-E, 6-F, 7-G, 8-H, 9-I and 10-J, which are photostatic copies of insurance contracts, for the inspection of the Tax Court of Appeals, said exhibits may be omitted from the transcript prepared by the Clerk of the Tax Court and transmitted in original form.

The exhibits referred to are photostatic copies of insurance contracts which it would be impracticable to attempt to copy in a form which would be intelligible to this Court.

this Court the original exhibits numbered 3-C, 4-D, 5-E, 6-F, 7-G, 8-H, 9-I and e with the Clerk of the Tax Court in said , bearing docket number 14,985, in the d Court, said original exhibits to be in oying the same into the transcript pre- ne Clerk of the Tax Court of the record herein.

July 29, 1949.

/s/ JOSEPH D. BRADY,

/s/ WALTER L. NOSSAMAN,

/s/ LUCIEN W. SHAW,

Counsel for Petitioners on
Review.

court of Appeals and Cause.]

DIRECTING TRANSMISSION OF FINAL EXHIBITS ON FILE WITH TAX COURT

ve-designated petitioners on review have
their petition for a review of the decision
Court of the United States in a proceed-
said Tax Court bearing docket number
ch decision was entered by said Court on
49. Said petitioners have also duly filed
nation of the contents of the record on

with the Tax Court in lieu of transcribing
hibits into the record on review.

Accordingly, It Is Hereby Ordered that
of the Tax Court of the United States be
hereby, directed to furnish the United St
of Appeals for the Ninth Circuit the o
hibits numbered 2-B, 3-C, 4-D, 5-E, 6-F,
9-I and 10-J, on file with the Clerk o
Court in said action, bearing docket num
in the files of said Court, said original
be furnished in lieu of copying the sam
transcript prepared by the Clerk of the
of the record on review herein.

Dated: August 2, 1949.

WILLIAM DENMAN,
Chief Judge of the United States Court o
for the Ninth Circuit.

HOMER T. BONE,
WILLIAM E. ORR.

A true copy.

Attest. August 3, 1949.

PAUL P. O'BRIEN,
Clerk.

[Seal] By /s/ F. SCHMID,
Deputy.

[Endorsed]: Filed August 2, 1949 U.

[Endorsed]: Received and filed Aug
T.C.U.S.

Washington

Docket No. 14,985

OF MYRON SELZNICK, Deceased,
K OF AMERICA NATIONAL TRUST
SAVINGS ASSOCIATION, DAVID
ELZNICK and CHARLES H. SACHS,
titors,

Petitioners,

vs.

SIONER OF INTERNAL REVENUE,
Respondent.

CERTIFICATE

r S. Mersch, Clerk of The Tax Court
ited States do hereby certify that the
documents, 1 to 15 inclusive, constitute
l of the original papers and proceedings
ny office as called for by the "Designation
ents of Record of Review" in the pro-
fore The Tax Court of the United States
Estate of Myron Selznick, Deceased, Bank
a National Trust and Savings Associa-
d O. Selznick and Charles H. Sachs,
Petitioners, v. Commissioner of Internal
Respondent," Docket Number 14985 and
ne petitioners in The Tax Court proceed-
tiated an appeal as above numbered and

appear in the official docket book in my

In testimony whereof, I hereunto set
and affix the seal of The Tax Court of the
States, at Washington, in the District of
this 18th day of August, 1949.

[Seal] /s/ VICTOR S. MERSCH,

Clerk, The Tax Court

United States.

[Endorsed]: No. 12335. United States
Appeals for the Ninth Circuit. Estate
Selznick, Deceased, Bank of America
Trust and Savings Association, David O.
and Charles H. Sachs, Executors, Petition
Commissioner of Internal Revenue, Respondent.
Transcript of the Record. Upon Petition
a Decision of The Tax Court of the United States.

Filed August 22, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals
Ninth Circuit.

United States Court of Appeals,

For the Ninth Circuit

No. 12335

OF MYRON SELZNICK, Deceased,
OF AMERICA NATIONAL TRUST
SAVINGS ASSOCIATION, DAVID
SELZNICK and CHARLES H. SACHS,
ORS,

Petitioners on Review,

vs.

IONER OF INTERNAL REVENUE,
Respondent on Review.

Tax Court Docket No. 14,985

ITIONERS' DESIGNATION OF
ENTS OF RECORD ON REVIEW

rk of the above-entitled Court, and to
. Theron L. Caudle, Assistant Attorney
l, and Charles Oliphant, Chief Counsel,
u of Internal Revenue, Counsel for Re-
nt on Review:

tioners above, by their attorneys, hereby
for inclusion in the transcript of record
w the entire record before The Tax Court
ited States as transmitted to the Clerk
urt by the Clerk of the Tax Court, as

Docket Entries	
Petition	
Answer	
Stipulation	
Exhibits 1-A and 11-K.....	
(For Exhibits 2-B through 10-J, see H	
B., below)	
Memorandum Opinion	
Motion to Withdraw Memorandum Opinio	
to Permit Filing of Petitioners' S	
mental Brief—Denied	
Motion for Review by the Court of Rep	
a Division—Denied	
Respondent's Computation for Entry of D	
Stipulation with Respect to Entry of D	
Under Rule 50.....	
Decision	
Order and Decision.....	
Petition for Review and Proof of Service	
Petitioners' Designation of Contents of I	
on Review (to Tax Court).....	
Court Order re Original Exhibits.....	
Certificate and Seal.....	
Statement of Points on which Petitioners	
to Rely on Review.....	
Motion for Consideration of Original Exh	
Order for Consideration of Original Exh	

ation of Contents of Record on

..... —
s to be considered by the Court in Origin-
n, if ordered by the Court:

d by this Court of Appeals pursuant
nd Order filed herewith, Exhibits 2-B,
E, 6-F, 7-G, 8-H, 9-I, and 10-J, which
f Document Number 5 as filed with the
s Court by the Clerk of the Tax Court,
sidered by this Court in their original
ugh set out in the printed record. If
does not order the consideration of said
their original form, then they shall be
the printed record by the Clerk herein.

August 27, 1949.

/s/ JOSEPH D. BRADY,
/s/ WALTER L. NOSSAMAN,
/s/ LUCIEN W. SHAW,

Counsel for Petitioners
on Review.

—
ourt of Appeals and Cause.]

DAVIT OF SERVICE BY MAIL

lifornia,

Los Angeles—ss.

L. Haroff, being first duly sworn, de-
ays: That this affiant is a citizen of the

a party to the within and above entitled action. This affiant is making this service for Brady, Walter L. Nossaman and Lucien who are the attorneys for the Petitioner action.

That on the 29th day of August, 1949, I served the within Petitioners' Designation of Return of Record on Review on the Respondent in this action by placing a true copy thereof in an envelope addressed to one of the attorneys for said Respondent at the business address of said attorney, as follows: Theron L. Caudle, Assistant Attorney General, Department of Justice, Washington 25, D. C., by then sealing said envelope and depositing the same, with postage thereon prepaid, in the United States Post Office at Los Angeles, California.

That there is delivery service by United States mail at the place so addressed or there is communication by mail between the place so addressed and the place so addressed.

/s/ VIRGINIA L. HAROLD

Subscribed and sworn to before me this 29th day of August, 1949.

[Seal] /s/ JULIA M. FITZSIMMONS
Notary Public, in and for the County of Los Angeles, State of California.

My commission expires February 17, 1950.

[Endorsed]: Filed Aug. 30, 1949.

court of Appeals and Cause.]

POINT OF POINTS ON WHICH PETITIONERS INTEND TO RELY ON REVIEW

petitioners hereby designate the following as the points on which they intend to rely in the review of the proceeding by the United States Court of Appeals for the Ninth Circuit:

1. The Tax Court of the United States erred in its ruling that transfers of decedent to a trust created on January 29, 1932, totaling \$301,756.93, were includible in the decedent's gross estate for estate tax purposes, in reliance solely upon the authority of the Supreme Court in the case of *Estate of Church v. Franco*, 301 U. S. 632, 69 S.Ct. 322, without giving petitioners any opportunity to argue the effect of the ruling herein.

2. The Tax Court erred in holding that decedent did not retain for his life, or for a term not ending before his death, the possession and enjoyment of, or the income from, the property thus erroneously included in decedent's gross estate by the Tax Court. (Sec. 302(c)(1) of the Internal Revenue Act of 1926, as amended by the Joint Resolution of March 3, 1931.)

3. The Tax Court erred in holding that decedent did not retain for his life or for a term not ending before his death the right to the possession and enjoyment of, or the income from, the property thus erroneously included in decedent's gross estate by the Tax Court, or the income therefrom.

4. With respect to none of the property erroneously included in decedent's gross estate, the Tax Court, was the enjoyment thereof at the date of decedent's death subject to a trust created through the exercise of a power either by decedent alone, or in conjunction with another person, to alter, amend or revoke. (Sec. 302(d), Internal Revenue Act of 1926.)

5. With respect to life insurance contracts which were a part of the property erroneously included in the decedent's gross estate by the Tax Court, at any time after January 10, 1941, did the decedent possess any incident of ownership therein. (g), Internal Revenue Code.)

6. The Tax Court erred in holding that there was any deficiency in Federal income tax based on including in gross estate said trust property of decedent of property to said trust.

7. The Tax Court erred in rendering its opinion and decision which, in the respects above stated, are contrary to the controlling law and authorities, and are not supported by any evidence in the case.

Dated: August 27, 1949.

/s/ JOSEPH D. BRADY

/s/ WALTER L. NOSSA

/s/ LUCIEN W. SHAW,

Counsel for Petitioner

on Review.

urt of Appeals and Cause.]

DAVIT OF SERVICE BY MAIL

California,

Los Angeles—ss.

L. Haroff, being first duly sworn, de-
clares: That this affiant is a citizen of the
United States of America, a resident of the County
of Los Angeles, over the age of eighteen years, not
a party to the within and above entitled action;
that the affiant is making this service for Joseph
Walter L. Nossaman and Lucien W.
Nossaman are the attorneys for the Petitioners in

that on the 29th day of August, 1949, affiant
has read the within Statement of Points on Which
the Petitioners Intend to Rely on Review on the re-
sult of this action by placing a true copy
of the same in an envelope addressed to one of the
attorneys for record for said Respondent at the
address of said attorney, as follows:
Caudle, Esq., Assistant Attorney Gen-
eral, Department of Justice, Washington 25, D. C.,
and mailing said envelope and depositing the
same with postage thereon fully prepaid, in the
United States Post Office at Los Angeles, Cali-

for there is delivery service by United States
Mail at place so addressed or there is a regular

communication by mail between the place
ing and the place so addressed.

/s/ VIRGINIA L. HARO

Subscribed and sworn to before me the
of August, 1949.

[Seal] /s/ JULIA M. FITZSIMM
Notary Public, in and for the County of
geles, State of California.

My commission expires February 17,

[Endorsed]: Filed Aug. 30, 1949.

[Title of Court of Appeals and Cause.]

MOTION FOR CONSIDERATION
ORIGINAL EXHIBITS

On August 2, 1949, the Honorable William
man, Chief Judge of the United States
Appeals for the Ninth Circuit, and the
Homer T. Bone and the Honorable William
Judges of said Court, made an order directing
the Clerk of the Tax Court of the United States
furnish to this Court original exhibits Nos. 14,985
through 10-J, on file with the Clerk of the Tax
Court in this proceeding, bearing Docket No. 14,985
in the files of said Court, said original exhibits
to be furnished in lieu of copying the transcript
prepared by the Clerk of the Tax Court of the record
on review herein.

bits transmitted in their original form
tic copies of insurance contracts, which
npractical to attempt to reproduce in
a form which would be intelligible to

s on review therefore respectfully re-
is Court make its order that each of the
hibits transmitted in original form, be-
s 2-B through 10-J, be omitted from the
rd herein and instead be considered by
n connection with this review in their
n as though set out in the printed rec-
id review.

August 27, 1949.

/s/ JOSEPH D. BRADY

/s/ WALTER L. NOSSAMAN

/s/ LUCIEN W. SHAW

Counsel for Petitioners
on Review.

court of Appeals and Cause.]

FOR CONSIDERATION OF ORIGINAL EXHIBITS

e-designated petitioners on review have
their motion for consideration in their
m of certain exhibits heretofore trans-
is Court by the Clerk of the Tax Court
ed States and good cause therefor an-

he 29th day of August, 1949, affiant
within Motion for Consideration of
hibits on the Respondent in this action
true copy thereof in an envelope ad-
ne of the attorneys of record for said
at the business address of said attorney,
Theron L. Caudle, Esq., Assistant At-
ral, Department of Justice, Washington
then sealing said envelope and deposit-
e, with postage thereon fully prepaid,
ed States Post Office at Los Angeles,

e is delivery service by United States
place so addressed or there is a regular
on by mail between the place of mailing
e so addressed.

/s/ VIRGINIA L. HAROFF

and sworn to before me this 29th day
1949.

/s/ JULIA M. FITZSIMMONS

ic, in and for the County of Los An-
ate of California.

ssion expires February 17, 1952.

]: Filed Sept. 1, 1949.

United States Court of Appeals
for the Ninth Circuit
No. 12335

OF MYRON SELZNICK, Deceased,

,

vs.

SIONER OF INTERNAL REVENUE.

MANDATE

ates of America—ss.

resident of the United States of America

onorable the Judges of the Tax Court of
United States.

s, lately in the Tax Court of the United
fore you or some of you, in a cause be-
tate of Myron Selznick, Deceased; Bank
ca National Trust and Savings Associa-
id O. Selznick, Charles H. Sachs, Execu-
tioners, and Commissioner of Internal
respondent, Docket No. 14985, a Decision
entered on the 3rd day of June, 1949,
d Decision is of record and fully set out
use in the office of the clerk of the said Tax
the United States, to which record refer-
ereby made and the same is hereby ex-
ade a part hereof:

petitioned to this court as by the inspection of the transcript of the record of the said Tax Court. The said cause was brought into the United States Court of Appeals for the Ninth Circuit by virtue of a writ of certiorari agreeably to the Act of Congress, in which Act it was made and provided, fully and at large as follows:

And Whereas, on the 28th day of December, 1949, of the year of our Lord, one thousand nine hundred and forty-nine, the said cause came on to be heard before the said United States Court of Appeals for the Ninth Circuit, on the said transcript of the record and on stipulation of counsel for respectively the appellant and the respondent, that the decision of the Tax Court should be affirmed and the cause remanded to the Tax Court for further consideration.

On Consideration Whereof, It is now heard, considered and adjudged by this Court that the decision of the said Tax Court of the United States in the said cause be, and hereby is vacated, and that this cause be, and hereby is remanded to the Tax Court of the United States for further consideration in view of the amendments of October 25, 1949, to sections 811 (c) and also subdivisions (d) and (e) of the Internal Revenue Code (December 28, 1946).

You, Therefore, Are Hereby Commanded that such proceedings be had in said cause, in conformity with the judgment of this court, as according to right and justice, and the laws of the United States ought to be had, the said petition for review

the Honorable Fred M. Vinson, Chief
of the United States, the twenty-eighth day
ber, in the year of our Lord one thousand
dred and forty-nine.

/s/ PAUL P. O'BRIEN,
United States Court of Appeals for the
a Circuit.

d and filed T.C.U.S. January 4, 1950.

the Tax Court of the United States
Docket No. 14985

OF MYRON SELZNICK, Deceased;
K OF AMERICA NATIONAL TRUST
SAVINGS ASSOCIATION, DAVID O.
ZNICK AND CHARLES H. SACHS,
utors,

Petitioners,

vs.

SIONER OF INTERNAL REVENUE,
Respondent.

Promulgated November 28, 1950

ON AND SUPPLEMENTAL OPINION

edent created an irrevocable trust on Jan-
1932, to which and prior to June 7, 1932,
ferred insurance contracts and bonds. The

accrued at the decedent's death be paid to trust beneficiary. Under the terms of the decedent could cancel the insurance policy, the proceeds thereof would become part of the corpus, the investment of which he could receive the income from. At the decedent's death there were \$1,138.36 of accrued trust income which the trustee had not distributed to the decedent. The decedent died in 1944. Section 811 (b) of the Code and makes it applicable to decedents dying after February 10, 1939. Section 811 (b) of the 1949 Act further provides that property transferred after March 3, 1931, and June 7, 1932, will not be included in the gross estate unless it would have been includible by the amendatory language of the Joint Resolution of March 3, 1931 (46 Stat. 1516).

1. Held, the non-insurance assets transferred to the trust prior to June 7, 1932, are not includible in the decedent's gross estate by reason of the amendatory language of the Joint Resolution of March 3, 1931, and section 811 (c) of the Code.

2. Held, further, the insurance proceeds are not includible in the decedent's gross estate by reason of section 811 (g) of the Code.

LUCIEN W. SHAW, ESQ.,
For the Petitioners.

an, Judge:

pendent determined a deficiency of \$384,-
the estate tax liability of the Estate of
lznick, deceased. On June 23, 1947, the
of the Estate of Myron Selznick peti-
s Court for a redetermination of the

The parties came to agreement and set-
tupulation many of the issues from which
art of the deficiency arose. On April 1,
Memorandum Opinion of this Court was
hich sustained the respondent's inclusion
ss estate under section 811 (c), Internal
Code, of certain property transferred by
ent in trust. That Memorandum Opinion
on the recent decision in the case of
ner v. Estate of Church, 335 U.S. 651.
3, 1949, a decision of the Tax Court was
at there was a deficiency in estate tax
2.44. The petitioner appealed from that
o the Court of Appeals for the Ninth
hich remanded the proceedings to this
e nature of the cause under mandate is
herein, in part, as follows:

* on stipulation of counsel for respective
s that the decision of the Tax Court
l be vacated and the cause remanded to
ax Court for further consideration:

Consideration Whereof, It is now here

States in this cause be, and hereby is
and that this cause be, and hereby is
to the Tax Court of the United States
for consideration in the light of the
amendments of October 25, 1949, to Section
and also subdivisions (d) and (g) of
Internal Revenue Code.

The amendments to the Code enact certain
active statutory changes in the law as at
Commissioner v. Estate of Church, supra,
in our Memorandum Opinion vacated by
the Court of Appeals for the Ninth Circuit.

The factual record we have before us is
as in the prior proceedings and consists
of pleadings and a stipulation of facts with
attached. The facts as stipulated are so far
insofar as they are pertinent to the issue
being, are set forth below.

The parties have submitted additional
which the argument is directed toward
now before us, viz:

Whether any part of the assets transferred
by the decedent to a trust created by him on
September 29, 1932, should be included in the decedent's
estate under section 811 (c) or (d) or (e)
of the Code, as amended by P.L. 378, 81st Cong.

Findings of Fact

The petitioners are the duly appointed
executors of the last will and testament of

estate tax return of the decedent was
the collector of internal revenue for the
dict of California on June 22, 1945.

January 29, 1932, the decedent created a trust
the Citizens National Trust and Savings
Los Angeles as trustee.

II of the trust agreement reads as follows:

Trustor agrees that as to the insurance
es delivered to the Trustee or which may
fter be delivered to it:

cause each and every policy intended to
ade subject to this agreement and the
hereunder to be made payable to the
ee by sufficient designation as beneficiary
f, or in such other manner as the parties
and any insurer shall agree, and the
ee assumes no responsibility for the suffi-
or effect of any instrument or agreement
ich any policy shall be made payable to it.

III of the trust agreement provides, in

ing the lifetime of the Trustor, Myron
ck, no sale or exchange of property which
t any time comprise the principal of the
estate, and no change in the investments
e principal of the trust estate, shall be
by the Trustee except on the written
and direction of said Trustor or his duly
rized agent,,
id Trustor, his heirs, assigns, and

designated from time to time, the direct, in writing, said Trustee as to investment of all cash principal, in any and/or property whether or not the be approved and permissible by law investment of trust funds under the laws of of California. * * * The Trustor reserves the right by written instrument with the Trustee, to revoke said appointment of David O. Selznick and/or Loyd W. to substitute other persons to act in lieu of David O. Selznick and/or Loyd in the capacities herein in this paragraph provided for them to act.

Article VI of the trust agreement provides in part:

* * * [The trustees] shall, after cash or other securities have been deposited in this trust so that the income therefrom is sufficient, (until such time the Trustor shall elect to pay said premiums himself), also pay and all premiums on life insurance policies and/or contracts which may be transferred and/or delivered by the Trustor to the Trust pursuant to the terms hereof, * * *

Article VII of the trust agreement reads in part as follows:

This Trust is irrevocable. The income received and derived from

by said Trustee paid monthly or in convenient installments as directed by Trustor to Myron Selznick for and during lifetime; the said Myron Selznick, however, reserves the right to direct the Trustee from time to time to credit, keep and add any and all income which, pursuant to the terms hereof, is payable to him, to the principal of the trust estate, by giving written directions from time to time so demanding.

VIII of the trust agreement reads, in full as follows:

From and after the death of the said Myron Selznick, the entire net income received or derived from the trust estate and available for distribution hereunder shall go and be paid by the Trustee in equal monthly installments, as follows: [There follows various provisions for distribution of the trust income to the deceased's widow, daughter, parents, brothers and children and a final provision for termination of the trust and distribution of the principal and for remainder to charity on the death of any of the heirs surviving.]

VIII further provides that:

Trustor reserves the right to change or substitute, from time to time, the said charitable institutions, by giving notice of such change or substitution to the Trustee in writing.

Notwithstanding the fact that this
tion of Trust is irrevocable, the Trust
himself and on behalf of the beneficiaries
serves the right to petition any court of
petent jurisdiction at any time and
to time to amend and/or construe the
provided, however, that no amendment
change the provisions of this trust which
have the effect or which is intended to
cause the same to be construed to be
it to be a revocable trust rather than a
vocable one.

The Trustor reserves the absolute right
cancel or cause to be cancelled, and
cause to be revoked, any of the insurance
cies herein referred to, or which may
be added to this Trust, provided that
obtain the written consent of any two of the
following, to wit: The Trustee, David
nick and Loyd Wright; provided further
upon any cancellation any cash surrenders
ues received on any such policies, shall
in and/or be added to the corpus of the

Article XIII of the trust agreement
follows:

Any income accrued or undistributed
termination of any trust or estate hereunder
shall belong and go to the beneficiary

ed, however, that it is an express condition of the trust herein created, which shall have precedence over any and all other provisions herein relative to the distribution of the trust estate, that the Trustee is authorized and empowered and may in its sole and absolute discretion, although it is not obligated so to do, to pay out of the net income and/or principal of the trust estate and in such manner as to it may seem equitable and just, pay a reasonable sum toward defraying either in whole or in part the expenses of the last illness and of the funeral of the Trustor and/or any specifically named or contingent beneficiary or beneficiaries of the said Trust.

Decedent transferred assets to said trust as

February 29, 1932, decedent transferred to the trust assets (other than life insurance contracts) having a value on the date of decedent's death of \$28.81. After June 6, 1932, decedent transferred to said trust, assets (other than life insurance contracts) having a value on the date of decedent's death of \$130,817.79, which amount it is agreed, in any event, is properly included in decedent's gross estate (and which is \$28.81 more than the amount reported on decedent's estate tax return on account of said assets). It is also assigned to the trust, prior to June 6, 1932, life insurance contracts owned by him, as

Number	Insurance Company
4,330,590	Mutual Life Insurance Company.....
10,484,859	New York Life Insurance Company.....
10,484,860	New York Life Insurance Company.....
10,541,918	New York Life Insurance Company.....
62,036	Peoples Life Insurance Company.....
63,287	Peoples Life Insurance Company.....
108,328-R	Indianapolis Life Insurance Co.....
102,324	Indianapolis Life Insurance Co.....
109,395	Indianapolis Life Insurance Co.....

The total proceeds of the life insurance as of the date of decedent's death, were \$1 of which the portion allocable to premium prior to January 10, 1941, was \$148,805.10 portion allocable to premiums paid after was \$39,470.21, which latter sum, it is and agreed, is in any event, includible in gross estate (and which represents \$62.63 the amount reported in the estate tax account of said insurance).

As set forth in the declaration of trust income of the trust was to be paid to Myrick. The trustee paid various amounts to decedent from time to time as follows:

Date	Amount of
July 1, 1932	\$ 4
January 11, 1933	1,5
April 10, 1933	1,6
September 2, 1933	8

Amount of Payment

6, 1934	\$2,410.62
st 16, 1934	1,422.41
mber 5, 1934	1,334.95
mber 2, 1934	1,262.59
mber 2, 1934	459.22
ary 1, 1935	2,448.77
4, 1935	716.00
2, 1935	1,879.53
t 7, 1935	2,376.99
mber 4, 1935	544.65
mber 4, 1935	436.68
mber 4, 1935	1,571.99
ry 4, 1936	23.98
ary 4, 1936	714.90
2, 1936	480.00
2, 1936	100.00
3, 1936	1,357.59
t 3, 1936	3,244.81
mber 3, 1936	500.00
mber 21, 1936	71.53
er 7, 1936	1,212.46
mber 6, 1936	457.40
ry 9, 1937	3,626.45

Date	Amount of
May 5, 1937	\$2,
July 6, 1937	
August 6, 1937	6,
September 3, 1937	10,
April 11, 1940	20,
June 5, 1940	
November 8, 1940	
March 18, 1942	1,

On the date of decedent's death there was \$1,138.36 of trust income on hand with tax thereon which had accrued and which had not been distributed to the decedent.

It was stipulated that, depending upon the Court's decision with respect to the deductibility of the amounts includible in gross estate on account thereof will be as follows:

If the Court finds that neither the non-exempt assets nor the life insurance contracts transferred to the trust prior to June 7, 1932, are includible in gross estate, the amount includible in gross estate on account of the trust is \$170,288 (which is more than the amount included on account of the same in the estate tax return).

If the Court finds that the non-insurance contracts transferred to the trust prior to June 7, 1932, are not includible in gross estate but that the life insurance contracts transferred to the trust prior to June 7, 1932, are includible in gross estate, the amount includible in gross estate on account of the trust is \$170,288 (which is more than the amount included on account of the same in the estate tax return).

19,093.10.

Court finds that all of the assets transferred to the trust (including both life insurance assets and insurance contracts) are included in gross estate, the amount includible in the gross estate on account thereof is \$472,044.93.

Amount determined in the notice of deficiency that all of the property transferred by the decedent to the trust created on January 29, 1932, is included in the gross estate of the decedent pursuant to section 811 (c) of the Internal Revenue Code.

In the proceedings in the Court of Appeals for the Ninth Circuit the parties stipulated as follows:

This is an estate tax case and it presents the question whether property transferred to a trust should be included in the gross estate of the decedent, pursuant to Section 811 (c), (d) of the Internal Revenue Code.

The Tax Court held that the property in question should be included in the decedent's gross estate under Section 811 (c) and based its decision solely on the *Church* case (*Commissioner v. Estate of Church*, 335 U.S. 632). The Tax Court's memorandum opinion was filed herein on April 1, 1949. Since that time Section 811 (c) has been amended and the holding of the *Church* case has been affected.

the circumstances it seems appropriate that the decision of the Tax Court be vacated and the cause be remanded to it for further proceedings.

Accordingly it is hereby stipulated that the decision below should be vacated and the cause should be remanded to the Tax Court for further consideration in the light of the mentioned amendments to Section 811 and also subdivisions (d) and (g).

* * *

Opinion

The issue is whether any of the assets transferred by the decedent, prior to June 7, 1932, in the trust created by him on January 29, 1932, should be included in the decedent's gross estate under section 811 (c) or (d) or (g) of the Internal Revenue Code, as amended by P.L. 378, 81st Congress (1949).

The decedent created a trust to which he transferred income-yielding property and also life insurance policies on his own life. We shall consider first whether the income-yielding property (referred to as the non-insurance assets) should be included in the gross estate under section 811 (c) and then the question of the includibility of the insurance assets under section 811 (g). We shall then discuss the necessity for the treatment of the insurance assets in its separate phases which will be apparent from the discussion to follow.

part by the exact statutory language lies. The question is a narrow one and only to a limited area in the history of specifically, transfers between the dates 1931, and June 7, 1932. We shall make it to review the entire judicial and legislative history of the various Code provisions mentioned.* Much of the confusion that has in the past concerning the various interpretations of what is now section 811, has no bearing on the controversy other than as a source of additional material. The recent amendment to section 811 in the 1949 Act has done much to clear up the confusion. In any event, it is a field which has been described as so fluid "that the wise man is dogmatic even when that is true." Paul, *Estate and Gift Taxation* (1942), page 338. The terms of section 7 (b) of P.L. 378, 81st Congress (1949), section 811 (c), as set forth in the Act, are made applicable to the estates of decedents.

We may refer the reader to *Tax Law* (March, 1950, page 309; 58 *Yale Law Journal* 395).

L. Gross Estate.

The value of the gross estate of the decedent shall be determined by including the value at the time of death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States——

* * *

Transfers in Contemplation of, or Tak-

decedent dying after February 16, 1933. This is therefore, within the purview of the 1949 Act. Section 7 (b) of that Act further provides, that:

* * * The provisions of section 81 (B) of such code shall not, in the case of a decedent dying prior to January 1, 1932, apply to—

(1) a transfer made prior to March 3, 1931, or

(2) a transfer made after March 3, 1931, and prior to June 7, 1932, unless the transferor would have been including the decedent's gross estate by reason of the mandatory language of the joint resolution of March 3, 1931 (46 Stat. 1516).

The "amendatory language of the joint resolution of March 3, 1931 (46 Stat. 1516)" referred to above reads, in the pertinent part, as follows:

time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth) by trust or otherwise—

* * *

(B) under which he has retained for himself or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death, the right of possession or enjoyment of, or the right to receive income from, the property, or (ii) under which either alone or in conjunction with another person he has retained for himself or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death, the right of possession or enjoyment of, or the right to receive income from, the property,

including a transfer under which the donor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom; * * *

Words were added to section 302 (c) of the Act as follows:

302. The value of the gross estate of a decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * *

To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of death or intended to take effect in possession or enjoyment at or after his death, [here was added the amendatory language of the joint resolution of March 3, 1931] except in case of a sale for an adequate and full consideration in money or money's worth. * * *

Question, therefore, is whether or not the donor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property." This applicable part of the amendatory language

cluded in the gross estate.

The facts in the light of which the pre-
tory language must be interpreted may
marily set forth as follows: On January
the decedent created an irrevocable trust
(and prior to June 7, 1932) he transferred
assets. The trust provided that:

* * * The entire net income received
rived from the trust estate and available
distribution hereunder shall be by said
paid monthly or in other convenient
ments as directed by the Trustor
Selznick for and during his lifetime
Myron Selznick, however, reserves the right
direct the Trustee from time to time
keep and add any and all income which
suant to the terms hereof, may be paid
him to the principal of the corpus of the
estate, by giving written instructions
to time so demanding.

* * *

Any income accrued or undistributed
termination of any trust or estate hereunder
shall belong and go to the beneficiaries
beneficiaries entitled to the next
estate, in the same proportions as set forth in the
principal hereof, * * *

On the date of the decedent's death there was
\$1,138.36 of accrued trust income which the

created, the decedent's estate would be he retained "the possession or enjoyment income from, the property." In the face language the decedent created this trust that he be paid the income "monthly or convenient installments as directed" by could seem that to state the question thus, provide the answer. But the petitioners conclude because the decedent did not receive all income from the trust which accrued during he did not retain "the possession or enjoyment the income from the property." That petitioners contend that the decedent "* * * the right to the income only for a period to end before the end of his life. Therefore the language of section 302 (c), as it January 29, 1932, the transfer was not Petitioners concede that assets transferred to the trust after June 6, 1932, are includible in the gross estate.

Petitioners seek to derive support for their position from the Committee Reports on the Revenue Act of 1932 and the respondent's regulations. The material part of the 1932 Act is set forth in Exhibit 1.²

2. The value of the gross estate of the decedent shall be determined by including the value of his death of all property, real or personal, tangible or intangible, wherever situated—

* * *

1932, Cumulative Bulletin 1939-1, Part 2, p. 532, reporting upon the amendment to section 302 (c) of the Act of 1926 (as amended by the Joint Resolution of 1931), read, in part, as follows:

The purpose of this amendment to section 302 (c) of the Revenue Act of 1926 is to amend that section in certain respects. The amendments made in that section by the joint resolution of March 3, 1931, which were adopted to render a transfer under which the decedent retained the income for his life. The joint resolution was designed to avoid the effect of the decision of the Supreme Court holding such a transfer not taxable if irrevocable and not made in contemplation of death. Certain new amendments have also been added, which is without retroactive effect.

The changes are:

(1) The insertion of the words "or for any period not ascertainable without reference to his death," is to reach, for example, a transfer where decedent reserved to himself the right to make payments of the income of a trust which he had established, but with the provision

intended to take effect in possession or enjoyment at or after his death, or of which he had at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death, for any period which does not in fact ex-

the trust income between the last semi-annual payment to him and his death should be paid to him or his estate, or where he received the income, not necessarily for the remainder of his life, but for a period in the enjoyment of which the date of his death was a necessary element.

* * *

Petitioners contend that the 1932 Act as it is phrased "or for any period not ascertainable without reference to his death" provides for the creation of a trust with reservation of "semi-annual payments of income, and was new matter and not retroactive. Changes (2) and (3) have been omitted for the sake of brevity) and state that they are each merely a "clarification." Change (1), which is set out above, also states, and from this petitioners conclude that Change (1) is new matter and not retroactive. In support of this view, the petitioners cite the administrative interpretation of the law in Regulations 105, sec. 81.18.³

18. Transfers with possession or enjoyment.—Except in the case of a bona fide purchase for an adequate and full consideration in money's worth, the gross estate embraces (a) all property transferred by the decedent, whether in trust or otherwise, if he retained the use, possession, right to the income, or other enjoyment of the transferred property at the time the transfer was made—

At any time after 10:30 p.m. eastern

There is opposed to petitioners' view purpose of the Joint Resolution of 1931 guage of which determines this issue. In *Heiner*, 281 U.S. 238 (1930), the decedent transferred property in trust, the income was to go to her husband for his life and her for her life. It was held that the property was not includible in the decedent's gross estate. Next year, on March 2, 1931, the Supreme

a period as to evidence his intention should extend at least for the duration of his life and his death occurs before the end of such period; or

(2) At any time after 5 p.m., eastern standard time, June 6, 1932, and such reservation is for any period mentioned in

(1) or for any period not ascertainable without reference to his death.

A reservation for a "period not ascertainable without reference to his death" may be illustrated by a reservation of the right to receive, in periodic payments, the income of the transferred property where none of the income between the last periodic payment and decedent's death was received by him or his estate; or by a reservation of a life estate following a precedent estate for a term of years.

The use, possession, right to the income and enjoyment of the property will be considered as having been retained by or reserved to the decedent to the extent that during any such period the property may be applied towards the discharge of a legal obligation of the decedent, or otherwise for his personal benefit.

If such retention or reservation is of a part of the use, possession, income, or other

three per curiam opinions, based on
einer, supra. Those cases differed from
einer, supra, in that there was no inter-
estate, i.e., the income was reserved for
with other disposition at death. This
is the same as the present situation
here we have the payment provision
the income accrued at grantor's death
beneficiaries. The point is that it was
of life income which was before Con-
n, on the very next day after the three
decisions were rendered, the Joint Reso-
March 3, 1931, was enacted. The meaning
resolution was clear—the reservation of
will bring the transferred property
gross estate of the transferor. The peti-
gument is that the language of the Joint
of 1931 as it provides for a trust with-
tained, did not cover the present trust;
so it took the full force of the language
2 Act which was not retroactive; that the
of the 1932 Act as it states “or for any
ascertainable without reference to his
the use of words in the statute which, for
me, reaches this type of trust. In order
at this argument, petitioners must first
ew that “reservation of income” requires
cent of income to go to the decedent-

other than reliance on the confusion and uncertainty that existed in 1931 and 1932 concerning subject sections of the law. We need not know that confusion or share ancient doubt is another day and another atmosphere; the old language must be examined, for the language of the 1931 change that is revived in the 1949 Act. In this connection, it is important to note that there was some doubt in Congress about the section of the 1949 Act providing for the trusts created between March 3, 1931, and June 7, 1932, was at all necessary.⁵ Had

⁵In the genesis of the 1949 Act, what is now section 7 (b) (2) thereof was apparently first brought to light on the floor of the Senate with the following colloquy:

Mr. George: Mr. President, the Senator from Colorado has some amendments to this section, I believe, and the Senator from Pennsylvania left with me an amendment which should now be considered. I will get up to the desk and ask that it be stated. I will explain that it is intended to take care of certain cases of transfers after March 3, 1931, and prior to June 7, 1932, at which time the Senator by appropriate resolution, undertook to clarify their existing in the future, but did not make that resolution retroactive to March 3, 1931. I doubt whether it is necessary, and I will refer it to the Senator from Pennsylvania, but I want to make certain, I now offer the amendment. [Emphasis added].

The Presiding Officer: The clerk

been adopted, it would have left trusts during the critical period to be examined fully under the new section 811(c) (1) (b). The petitioner tacitly admits would render transfers taxable. It is apparent that in the Congress meant only to give the pre- the benefit of reliance on *May v. Heiner*, to create any new basis for interpretation of the Revenue Resolution of 1931 and subsequent law to allay the doubts that might have existed in 1929 as to their interpretation.

The most damaging aspect of the petition is its failure to survive an appraisal of the substance of the transfer itself. All of the

new paragraph" and insert in lieu thereof two new paragraphs," and at the end of section 811 to add a new paragraph reading as follows:

Exception in the case of transfers after March 3, 1931, and prior to June 7, 1932: Property transferred after March 3, 1931, and prior to June 7, 1932, shall not be included in the gross estate under this subsection by reason of the fact that the decedent retained any rights described in the amendatory language in section 803 (a) of the Revenue Act of 1931 unless such property is includible by reason of the amendatory language of the joint resolution of March 3, 1931 (46 Stat. 1516).

George: Mr. President, I should like to say that both the Senators from Pennsylvania are interested in this amendment. While I think it is precautionary, at the same time many very prominent lawyers in the State of Pennsylvania

until his power to command the payment of the income was ended by his death. He could not have used this income at any time and in any manner desired merely by so requesting the trustee. The decedent enjoyed the trust income during his life to the extent that he desired. No other person had any claim upon that income until the decedent's death and it was then determined how much, if any, the decedent had not called upon the trustee to pay over to him. The decedent retained the right to the trust income until the time of his death. The income to which he had a right but which he never reduced to possession was "retained" by him.

In our opinion, and in the language of the Regulations of 1931, the decedent made a transfer of the property which he "retained for his life * * * to the trust from, the property * * * ." We hold, therefore, that the non-insurance assets transferred by the decedent prior to June 7, 1932, to a trust created for him on January 29, 1932, are includible in his gross estate under section 811 (c) of the Code.

The next question for consideration is whether the proceeds of the insurance policies should be included in the decedent's gross estate. In analyzing the income-yielding property transferred to the trust which we have held above should be included in the gross estate, the decedent transferred the insurance policies to the trust, i.e., he made

the decedent paid the premiums on the
at least indirectly. Section 811 (g), as
by the Revenue Act of 1942, and section
of that Act apply and are set forth in the

1. Gross Estate.

Value of the gross estate of the decedent shall
be determined by including the value at the time of
death of all property, real or personal, tangible
or intangible, wherever situated, except real prop-
erty located outside of the United States—

* * *

Proceeds of Life Insurance.—

* * *

receivable by other beneficiaries.—To the extent of the amount
received by the estate of the decedent, the amount receivable by all other bene-
ficiaries of life insurance under policies upon the life of the decedent (A) purchased with premiums,
consideration, paid directly or indirectly by the decedent, in proportion that the amount so
received by the estate of the decedent bears to the total premiums paid for the insurance,
or (B) with respect to which the decedent possessed at his death any of the inci-
dental ownership, exercisable either alone or in conjunction with any other person. For the purposes of
clause (A) of this paragraph, if the decedent transferred, by assignment or otherwise, a policy of
life insurance, the amount paid directly or indirectly by the decedent shall be reduced by an
amount which bears the same ratio to the amount paid by the decedent as the amount
received by the estate of the decedent bears to the amount received by the estate of the decedent as the
amount in money or money's worth received by the estate of the decedent for the transfer bears to the value
of the policy at the time of the transfer. For the purposes of clause (B) of this paragraph, the term
"incidental ownership" does not include a reversionary interest.

law, the proceeds of the policies allocable to premiums paid by the decedent before January 1, 1941, will be includible in his gross estate under section 811(g) if he possessed any incident of ownership in the policies after that date. The estate tax return filers have stipulated that the portion of the proceeds allocable to premiums paid after January 1, 1941, is includible. The question remains whether the portion of the proceeds of the policies allocable to premiums paid prior to January 1, 1941, is includible in the gross estate.

The term "incident of ownership" is not defined in the tax law. Its use in the 1942 Act involves a substantial mental change, however, which reveals that the purpose of Congress was to cut "through" the avoidance schemes." Paul, Federal Estate Taxation, 1946 Supp. Section 10.37. The Committee Reports on the 1942 Act, 1942-2, Cumulative Supplement 491, 677, state that "Incidents of ownership are not confined to those possessed by the decedent

life insurance) is amended to read as follows:

"(g) Proceeds of Life Insurance.

* * *

(c) Decedents to Which Amendment Applicable.—The amendments made by subsection (b) shall be applicable only to estates of decedents who die after the date of the enactment of this Act, in determining the proportion of the premium paid for other consideration paid directly or indirectly to the decedent (but not the total premiums paid) and the amount so paid by the decedent on or before

legal sense." Prior to the 1942 Act, the trusts and the cases generally used the term "beneficial owners of ownership," see Paul, *Federal Taxation of Gifts and Trusts*, 1942-1 CB 100, 101. *Gift Taxation*, *supra*.

It contained the following provision:

Trustor reserves the absolute right to cause or cause to be cancelled, and revoke or to be revoked, any of the insurance policies herein referred to, or which may hereafter be added to this Trust, provided that he first obtain the written consent of any two of the Trustees, to wit: The Trustee, David O. Selzer and Loyd Wright; provided further, that any cancellation or any cash surrender value received on any such policies, shall remain in the Trust and/or be added to the corpus of this Trust.

The Trustor relies on the following language in Regulations 105, Section 81.27 (as amended 1939; 1943 Cum. Bul. 1094):

Beneficial owners of ownership in the policy include, for example, the right of the insured or his estate to its economic benefits, the power to designate the beneficiary to surrender or cancel the policy, to assign it, to revoke an assignment, to pledge it for a loan, or to obtain from the insurer a loan against the surrender value of the policy, etc. The insured possesses an incident of ownership if his death is necessary to liquidate his interest in the insurance, as for

to his estate, or payable as he might direct, should the beneficiary predecease him.

The petitioners contend that if the decedent surrendered the policies the proceeds would go to the benefit of the trust, not to the decedent. The respondent contends that this makes no difference, that the power alone to surrender the policies is not a sufficient incident of ownership.

The insurance policies were made payable to the trust and the decedent reserved in the policies the power to cancel the insurance policies if he obtained the written consent of any two of the following: The Trustee, David O. Selznick, and Wright. But the decedent reserved the power to revoke the appointment of the last two persons above and to "substitute other persons in their true, as the petitioners contend, that the proceeds of the cancelled policies would not immediately accrue to the decedent. But those proceeds would be invested by the trustee and the income therefrom would go to decedent for his life under the agreement. Further, the decedent reserved in the trust, the right to direct the trustee as to the investment of the trust corpus (a part of which the canceled policies would become) and the income therefrom directed by the decedent need not be "apparently impermissible by law for investment of trust property under the laws of the State of California.

It is apparent that the decedent could have cancelled the policies and the proceeds representing the

insurance to the decedent's benefit, the income from (since he reserved the trust income) would go to the decedent from such part of the proceeds as the decedent chose. The right to receive the income from such insurance is an "incident of ownership" within the meaning of the statute.

In our opinion, the proceeds of the insurance attributable to premiums paid prior to January 1, 1942, are includible in the decedent's gross estate under the provisions of section 811 (g) of the Internal Revenue Code, and we so hold.

We have held above that the non-insurance assets attributable under section 811 (c) and the insurance proceeds are includible under section 811 (g). In our opinion it is not necessary to consider whether the insurance assets should be included in the gross estate under section 811(c), although it has been held that insurance is not includible exclusively under section 811(g)⁷ that is, insurance has been includible if it has been transferred in contemplation of death under section 811(c). This aspect of the problem is not present here and in our opinion, we have no occasion with the mandate as to section 811 (c) and the insurance to discuss our discussion above.

Our holdings are dispositive of all of the issues presented. Material collected in Paul, Federal Estate Taxation, 1946 Supp., section 1039, paragraph 10,390, Committee Report reading: "[Section 811(g) as amended in 1942] does not constitute the

to consider whether they, or any of them, are includible under section 811 (d) of the Code.
Decision will be entered under Rule 5.
Served November 28, 1950.

The Tax Court of the United States
Washington

Docket No. 14985

ESTATE OF MYRON SELZNICK, DECEDENT,
BANK OF AMERICA NATIONAL
AND SAVINGS ASSOCIATION, DECEASED,
SELZNICK, and CHARLES H. SELZNICK,
EXECUTORS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION PURSUANT TO MANDATE

Pursuant to the mandate of the United States Court of Appeals for the Ninth Circuit, issued November 28, 1949, in which it was ordered and adjudged that the decision of the Tax Court rendered June 3, 1949, be vacated and the cause remanded to the Tax Court for further consideration in light of the amendments of October 25, 1949, to Section 811 (c) and also subdivisions (d) and (e) of the Internal Revenue Code, the case is

Court satisfactory evidence that the tax
paid and on March 30, 1951, the respond-
a revised computation of tax. Now, there-

l and Decided: That there is an overpay-
estate tax in the amount of \$12,108.22,
ount was paid after the mailing of the
deficiency.

/s/ ERNEST H. VAN FOSSAN,
Judge.

April 3, 1951.

April 4, 1951.

Tax Court and Cause.]

ON FOR REVIEW BY THE COURT
OF REPORT OF A DIVISION

residing Judge of the Tax Court
United States:

ers respectfully pray that the Presiding
ercise the discretion conferred on him by
118(b), I. R. C., and direct that the
lum Decision entered in the above pro-
n April 3, 1951, be set aside and that
r be reviewed by the entire Court.

h petitioners do not accept the decision
erein on April 3, 1951, and intend to peti-
on of that decision, the present peti-

reflected in the decision. The facts are a
On February 20, 1951, respondent filed
50 recomputation showing an overassessment
sum of \$6,273.87. The recomputation further
as follows (p. 2):

“*In the event that evidence of payment of
State inheritance taxes in the amount of
063.77 is submitted before the expiration of
sixty days after the decision of The Tax Court
of the United States becomes final, the deficiency
payment in the amount of \$68,337.64 will be
allowed.”

On March 26, 1951, petitioners filed
payment of inheritance taxes in the sum of
574.84, thereby becoming entitled to the
refund of an overassessment in the sum of \$68,
in accordance with respondent's own figures.
The decision entered however allows an overassessment
only \$12,108.22, which seems to be plainly erroneous.

We respectfully request that the April 10, 1951
decision be reviewed by the Court for the purpose
of correcting the error above referred to.

Respectfully submitted,

/s/ JOSEPH D. BRADY,

/s/ WALTER L. NOSSAM

Attorneys for Petitioners

Dated: April 10, 1951.

Received and Filed T. C. U. S. April 11, 1951.

the United States Court of Appeals
for the Ninth Circuit
Tax Court Docket No. 14,985
Cause.]

PETITION FOR REVIEW

Honorable Judges of the United States
of Appeals for the Ninth Circuit:

Estate of Myron Selznick, Deceased, Bank
of America National Trust and Savings Association
and O. Selznick and Charles H. Sachs, Ex-
ecutors, Joseph D. Brady and Walter L. Nos-
berger, their attorneys, respectfully petition the
Court as follows:

I.

Nature of Controversy

Plaintiffs are executors of the Estate of Myron
Selznick who died a resident of Beverly Hills, Cali-
fornia, March 23, 1944.

On January 29, 1932, decedent Selznick executed
and acknowledged a Declaration of Trust in which Citi-
zens National Trust and Savings Bank of Los An-
geles was trustee.

On January 29, 1932, decedent transferred to the
trust all his assets (other than life insurance contracts)
then of value on the date of his death of \$152,-
000. Decedent also transferred to the trust nine
life insurance contracts owned by him. The portion

miums paid prior to January 10, 1941, v
805.10.

Respondent in his 90-day letter determining these transfers by decedent, were includible in decedent's gross estate for Federal estate tax purposes. The transfers "intended to take effect in possession or enjoyment at decedent's death" coming "within the provisions of section 811 (c) of the Internal Revenue Code."

Petitioners have denied that the transfers were intended to take effect in possession or enjoyment at decedent's death because all decedent's income or other possession or enjoyment of trust assets ended, under the terms of the trust, prior to the date of decedent's death, and therefore the transfers were not includible in decedent's gross estate under section 302 (c) of the Revenue Act of 1938, as amended by the Joint Resolution of March 3, 1941 (Public Number 131, 71st Congress), which was the law applicable to these transfers, under section 811 (c), I.R.C.

Petitioners have also contended that the transfers are not includible in gross estate under any provision of the Internal Revenue Code.

The Tax Court, by order and decision dated June 7, 1949, upheld the determination of respondent that the transfers were includible in decedent's gross estate. In doing so it relied upon the decision of the Supreme Court in *United States in Commissioner v. Estate of*

...ing only at the moment of his death,
in this case, under the trust, the decedent's
income ended before his death.

...ers duly petitioned the United States Cir-
...t of Appeals for the Ninth Circuit to
...e Tax Court's decision. After the record
...sent to the Court of Appeals, petitioners
...ndent entered into a stipulation for re-
...he case to the Tax Court for further con-
...in view of legislation enacted by Congress
...case was pending. Section 7 (b) of P.L.
...Congress (1949), amends section 811 (c)
...de and makes it applicable to estates of
...dying after February 10, 1939. Section
...ne 1949 Act further provides that property
...d after March 3, 1931, and prior to June
...hall not be included in the gross estate
...would have been includible by reason of
...latory language of the Joint Resolution of
...1931 (46 Stat. 1516). This Court remanded
...to the Tax Court pursuant to the stipula-
...e parties.

...hearing of the cause pursuant to remand,
...ourt by decision entered April 3, 1951, ad-
...its former decision. A timely motion by
...s for review by the Tax Court of the
...the division rendering the decision was
...May 7, 1951.

...x Court erred:

...holding and deciding that transfers by de-

contracts) and of \$148,805.10 (with respect to insurance contracts) were includible in decedent's gross estate for Federal estate tax purposes.

2. In holding and deciding that there was a deficiency in Federal estate tax based on the said transfers or either thereof in the grounds stated above.

3. In rendering a decision which, in the grounds stated above enumerated, is contrary to the controlling law and regulations and is not supported by the evidence in the case.

4. In holding that there was an overpayment of the tax in the sum of only \$12,108.22 instead of the greater sum as would result from not including in the taxable estate the items mentioned in paragraph 1, above.

II.

Declaration of Court in Which Review Is Sought

Petitioners hereby declare that they seek review of the decision of the Tax Court of the United States by the United States Court of Appeals for the Ninth Circuit.

III.

Allegations to Establish Venue and Jurisdiction

Myron Selznick, the decedent herein, died a resident of Beverly Hills, California, on March 1, 1944. His estate is being administered in Los Angeles County, California. The petitioners

national banking association; David O. and Charles H. Sachs, are the duly appointed and acting executors of the last will and testament of Myron Selznick. This case involves the federal estate tax liability of petitioners as to their share of said estate.

That the United States Court of Appeals for the Ninth Circuit is established by the fact that petitioners' estate tax return (Form 706) was filed with the Collector of Internal Revenue for the District of California, located at Los Angeles, and the collection district is within the jurisdiction of the Court of Appeals for the Ninth Circuit, and by the fact that the parties hereto have stipulated that the decision by the Tax Court shall be reviewed by any Court of Appeals other than the one herein designated.

The petition is for a review of the decision by the Tax Court holding that transfers to the trust made by the decedent on January 29, 1932, in the total amount of \$152,951.83 and \$148,805.10, respectively, were included in his gross estate, and is filed pursuant to the provisions of sections 1141 and 1142 of the Internal Revenue Code.

Wherefore, petitioners pray that the decision of the Tax Court of the United States be reviewed by the United States Court of Appeals for the Ninth Circuit, and that a transcript of the record be prepared and transmitted with law and the rules of the Court be transmitted to the Clerk of the Court for

reviewed and corrected.

Dated: May 21, 1951.

/s/ JOSEPH D. BRADY,

/s/ WALTER L. NOSSAM

Attorneys for Petiti

State of California,

County of Los Angeles—ss.

W. W. Seward, being first duly sworn, he is an Assistant Trust Officer of Bank of National Trust and Savings Association, a banking association, which is one of the pointed and acting Executors (with Davi nick and Charles H. Sachs), of the Estate Selznick, deceased, petitioners on review that affiant is duly authorized to verify the ing petition for review; that affiant has foregoing petition for review, is familiar statements contained therein and that stated are true except as to those facts stated upon information and belief and those believes to be true.

/s/ W. W. SEWARD.

Subscribed and sworn to before me,
day of May, 1951.

[Seal] /s/ C. H. MICHEL,

Notary Public in and for the County of
geles, State of California.

Cause.]

NOTICE

s Oliphant, Chief Counsel for the Bureau
ternal Revenue, and to Theron L. Caudle,
tant Attorney General.

Take Notice that the above-named peti-
ave filed with the Clerk of the Tax
the United States their Petition for Re-
e decision of the Tax Court in the above-
ause, a copy of which petition is herewith
on you.

May 25, 1951.

JOSEPH D. BRADY, and
WALTER L. NOSSAMAN

By /s/ WALTER L. NOSSAMAN.

of Copy Acknowledged.

C.U.S. May 25, 1951.

Tax Court and Cause.]

PETITIONERS' DESIGNATION OF POINTS OF RECORD ON REVIEW

rk of the Tax Court of the United States:
ve-designated petitioners, being also the
s on Review, hereby designate for inclu-

ceedings on April 3, 1951, the entire
follows:

1. The documents and records specified in the Petitioners' Designation of Contents of Records for Review, filed in this Court on or about July 1, 1949, and heretofore transmitted to the United States Court of Appeals for the Ninth Circuit.

2. The original exhibits included in the Petitioners' Consideration of Original Exhibits made by the United States Court of Appeals for the Ninth Circuit on or about August 2, 1949.

3. Stipulation dated December 23, 1949, between the above-named Petitioners and the Commissioner of Internal Revenue, stipulating that the case was made by the Tax Court on April 1, 1949, by the United States Court of Appeals for the Ninth Circuit, and the cause remanded to the Tax Court for further consideration. (Not of Record. See Mandate.)

4. Order of the United States Court of Appeals for the Ninth Circuit remanding the cause to the Tax Court. (Not of Record. See Mandate.)

5. Decision of the Tax Court promulgated on November 28, 1950.

6. The Tax Court's decision pursuant to the Mandate, entered April 3, 1951.

7. Petitioners' Motion for Review by the United States Court of Appeals for the Ninth Circuit, Report of a Division, and Order of Mandate denying said Motion.

on for Review by the United States
appeals.

ce of Filing Petition for Review, together
f of Service thereof and of service of a
e Petition for Review.

tement of Points on which Petitioners
Rely on Review.

s Designation of Contents of Record on
ertificate and Seal.

is hereby made that a transcript of said
so far as it was not prepared, certified
mitted in connection with the Petition for
retofore filed in this cause) be prepared,
nd transmitted by the Clerk of the Tax
the United States to the Clerk of the
ates Court of Appeals for the Ninth Cir-
quired by law and the rules of said Court
.

May 28, 1951.

/s/ JOSEPH D. BRADY,

/s/ WALTER L. NOSSAMAN,

Counsel for Petitioners.

and Filed T.C.U.S. May 31, 1951.

CERTIFICATE

I, Victor S. Mersch, Clerk of the Tax the United States, do hereby certify that going documents, 1 to 24 inclusive, constitute all of the original papers and proceedings file in my office as called for by the "De as to Contents of Record on Review" in proceeding before the Tax Court of the United States, entitled "Estate of Myron Selznick, Deceased, et al., v. Commissioner of Internal Revenue, et al., Petitioners, v. Commissioner of Internal Revenue, Respondent," Docket Number 14985 and the petitioner in the Tax Court proceeding initiated an appeal as above numbered and together with a true copy of the docket of said Tax Court proceeding, as the same appears in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 11th day of June, 1951.

[Seal] /s/ VICTOR S. MERSCH,
Clerk, The Tax Court of the
United States.

U.S. No. 12980. United States Court of
for the Ninth Circuit. Estate of Myron
Deceased, Bank of America National
Savings Association, David O. Selznick
es H. Sachs, Executors, Petitioners, vs.
ner of Internal Revenue, Respondent.
of the Record. Petition to Review a
f The Tax Court of the United States.

June 16, 1951.

/s/ PAUL P. O'BRIEN,
The United States Court of Appeals for
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

Estate of MYRON SELZNICK, Deceased
of AMERICA NATIONAL TRUST
INGS ASSOCIATION, DAVID
NICK and CHARLES H. SACHS,
Petitioners on Re

vs.

COMMISSIONER of INTERNAL REVENUE
Respondent on Re

STATEMENT OF POINTS ON WHICH
TIONERS INTEND TO RELY ON RE

Petitioners hereby designate the following
the points upon which they intend to rely on
review of the above proceeding by the United
Court of Appeals for the Ninth Circuit:

1. The Tax Court of the United States
deciding that transfers of decedent to
created on January 29, 1932, totaling \$
were includible in the decedent's gross
federal estate tax purposes.

2. The decedent did not retain for himself
any period not ending before his death, the
sion or enjoyment of, or the income from
property thus included in decedent's gross
by The Tax Court

ate the persons who shall possess or enjoy
erty thus included in decedent's gross
The Tax Court, or the income therefrom.

h respect to none of the property included
nt's gross estate by The Tax Court was
ment thereof as of the date of decedent's
ject to any change through the exercise of
either by the decedent alone, or in con-
with any person, to alter, amend or revoke.

h respect to life insurance contracts which
art of the property included in the dece-
ss estate by The Tax Court, at no time
uary 10, 1941, did the decedent possess
ent of ownership therein.

Tax Court erred in holding and deciding
e was any deficiency in Federal estate tax
including in gross estate said transfers by
of property to said trust.

Tax Court erred in rendering a decision
the respects above-enumerated, is contrary
ntrolling law and regulations, and is not
by the evidence in the case.

May 28, 1951.

/s/ JOSEPH D. BRADY,

/s/ WALTER L. NOSSAMAN,

Counsel for Petitioners on
Review.

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

OF MYRON SELZNICK, Deceased, BANK OF
CALIFORNIA NATIONAL TRUST AND SAVINGS ASSOCIA-
TION, INC., DAVID O. SELZNICK and CHARLES H. SACHS,
Plaintiffs,

Petitioners,

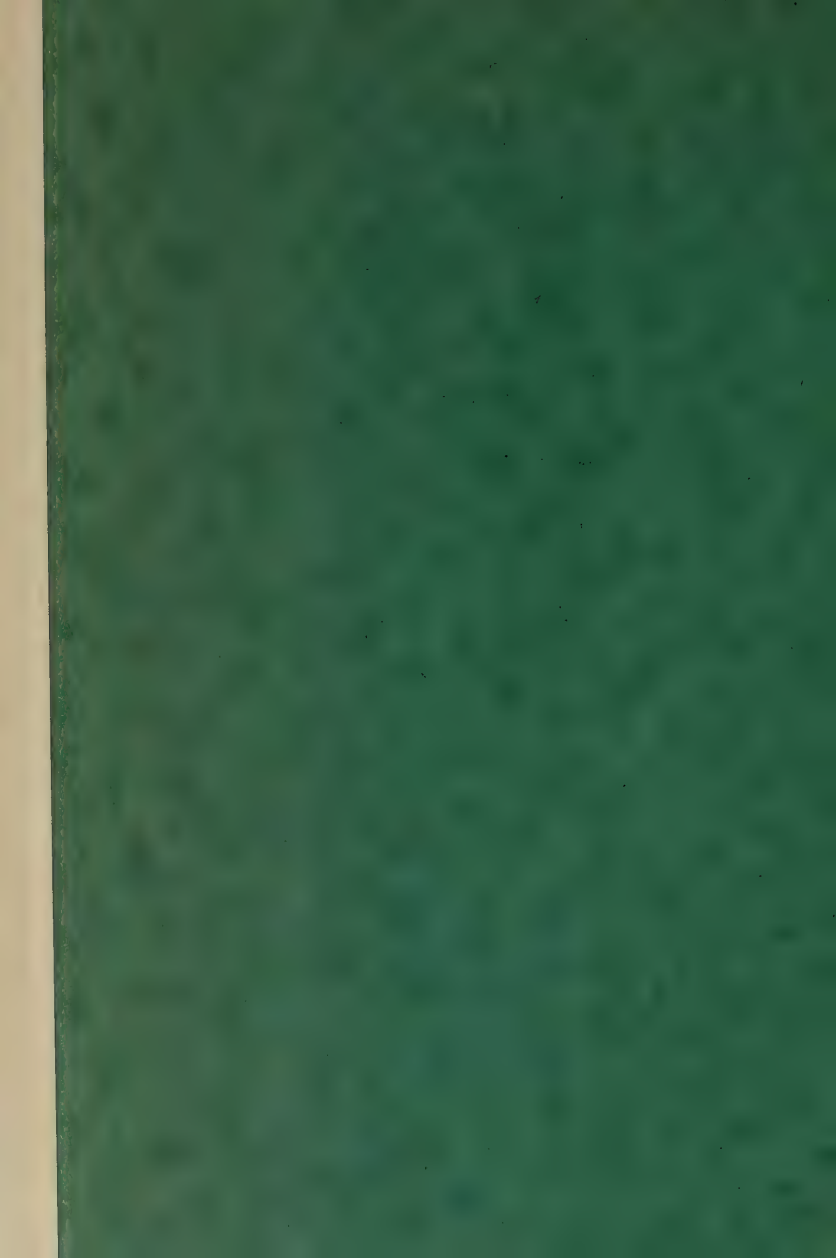
vs.

UNITED STATES DEPARTMENT OF INTERNAL REVENUE,

Respondent.

BRIEF FOR PETITIONERS.

JOSEPH D. BRADY,
WALTER L. NOSSAMAN,
c/o Brady & Nossaman,
433 South Spring Street,
Los Angeles 13, California,
Attorneys for Petitioners.



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Did the assets transferred by the decedent to the Janu- ary 29, 1932 trust, prior to June 7, 1932, includible in decedent's gross estate because of retention by him of the in- terest therefrom?	10
Did the decedent retain the right, either alone or in	

(b) Are any of the transfers made to the January 29, 1932 trust subject to the power of the decedent to alter, amend or revoke?.....

3. Are the proceeds of insurance policies assigned to the January 29, 1932 trust, prior to January 29, 1932, includible in the gross estate?.....

A. Effect of the Taxing Provision.....

B. Effect of Decedent's Transfer of Insurance Trust

C. Decedent Retained No Incident of Ownership.....

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

OF MYRON SELZNICK, Deceased, BANK OF
A NATIONAL TRUST AND SAVINGS ASSOCIA-
DAVID O. SELZNICK and CHARLES H. SACHS,
rs,

Petitioners,

vs.

ONER OF INTERNAL REVENUE,

Respondent.

BRIEF FOR PETITIONERS.

Jurisdictional Matters.

a petition to review a decision of the Tax Court
ited States, entered April 3, 1951. Petitioners
on filed April 12, 1951, denied by the Tax Court
1951, requested that the April 3 decision be re-
the Court [Tr. 153-154]. The present peti-
review was filed May 25, 1951 [Tr. 160], and
proof was served on respondent's attorneys on
[Tr. 161].

isdiction of this Court based on Section 1141

Hills, California. Following his death on M
1944, the petitioners, Bank of America Natio
and Savings Association, David O. Selznick and
H. Sachs were appointed and are now the qua
acting executors of his estate. The estate ta
(Form 706) was filed with the Collector of Inter
nue for the Sixth District of California, locate
Angeles. The parties have not stipulated that
sion may be reviewed by any Court of App
than this Court.

History of Prior Proceedings in the C

The taxpayers' petition was filed in the Tax
June 23, 1947, and thereafter came on for hear
November 29, 1948. On April 1, 1949, the C
dered its memorandum opinion [CCH Dec. 16
April 1, 1949; P-H TC Memo. ¶49,074; Tr
which gave effect to certain stipulations prev
tered into by the parties and upon the merits
the case was governed by *Commissioner v.*
Church, 335 U. S. 632, 93 L. Ed. 288, 69 S.
decided January 17, 1949.

Pursuant to this opinion, the order and de
the Tax Court finding a deficiency in estate tax
842.44 was entered on June 7, 1949 [Tr. 91].
was duly taken to this Court [Tr. 92 ff.].
and prior to any hearing thereon by this Court
pursuant to stipulation of the parties, was ren
the Tax Court [Tr. 119-121]. Pursuant to th
the Tax Court considered the case *de novo*, c

for different reasons, a summary of which we
the syllabus:

, the non-insurance assets transferred to the
prior to June 7, 1932, are includible in the
decendent's gross estate by reason of the amenda-
language of the Joint Resolution of March 3,
, and Section 811(c) of the Code.

, further, the insurance assets are includible
the decedent's gross estate under Section 811(g)
the Code.

**of the Facts of the Case, the Nature of the
Controversy, the Tax Involved and the Issues to
be decided.**

se involves an asserted deficiency in estate tax
estate of Myron Selznick. The amount of the
originally asserted was \$384,604.05, arising
inclusion in the gross estate of certain addi-
tions and the disallowance of certain deductions.
The first hearing in the Tax Court, agreements
reached by the parties eliminating all except one
issue, namely, whether or not all or any part of the
assets transferred by the decedent prior to June 7, 1932,
created by him on January 29, 1932 [Tr. 43-
44] are includible in the gross estate. These items fall
into three categories:

Assets having a value at the date of decedent's
death of \$152,951.83, transferred on January 29, 1932,
created by decedent on that date [Tr. 40].

received from these contracts were \$188,275.31 of which the portion allocable to premiums paid January 10, 1941, was \$148,805.10 [Tr. 41], portion allocable to premiums paid after that \$39,470.21 [Tr. 41].

There is no dispute as to includibility of assets transferred to the trust *after* June 6, 1932, having on the date of decedent's death of \$130,817.79 [Tr. 41] nor as to the includibility of the \$39,470.21 of insurance proceeds referable to premiums paid after January 10, 1941 [Tr. 41, 130]. The controversy before the Tax Court and here relates solely to the assets transferred to the trust prior to June 7, 1932, and the part of the proceeds of the insurance (all the proceeds having been assigned to the trust prior to the date) which is referable to premiums paid by the decedent directly or indirectly, prior to January 10, 1941.

A copy of the trust agreement in question was submitted to the Court [Ex. 1-A; Tr. 43-66]. Its date, January 1, 1932, the Court will observe, is in the interval between the Joint Resolution of March 3, 1931 (which provided, in express terms, by an Amendment to Section 302(c) of the Revenue Act of 1926, taxed irrevocable trusts retaining income to the grantor) and June 6, 1932, when Congress, to close a "loophole" left by the 1931 Act, amended, again amended Section 302(c) (now Section 811(c), I. R. C.) to include not only those trusts created under which the grantor retained income "for his life or any period not ending before his death" (1931 Act) but those in which he retained income

nick trust [Tr. 43-66] contained none of the *judicia* of taxability. It was irrevocable and un-¹, provided for no reversion, reserved no the grantor to change the enjoyment. Since case hinges on the construction of two or graphs of the trust, we shall reserve further of the trust, and all quotations from it, to riate place in the Argument.

ation of Errors Relied on by Petitioners.

ers rely upon the following points, as to which ved the Tax Court erred:

e Tax Court erred in deciding that transfers at to the January 29, 1932 trust totaling \$301,- fe insurance \$148,805.10, other assets \$152,- ere includible in the decedent's gross estate for ate tax purposes.

e decedent did not retain for his life, or any t ending before his death, the possession or of, or the income from, the property thus n decedent's gross estate by the Tax Court. 302(c)(1), Revenue Act of 1926, as amended nt Resolution of March 3, 1931.)

h respect to life insurance contracts which rt of the property transferred by the decedent st prior to June 7, 1932, and included in the gross estate by the Tax Court, at no time uary 10, 1941, did the decedent possess any f ownership therein. (Section 811(g), Inter-

nal Revenue Code; see also Section 404(c), Revenue Act of 1942, as amended by Section 503(a) of the Revenue Act of 1950.)

4. The Tax Court erred in deciding that there was any deficiency in Federal estate tax based on the value of the property in decedent's gross estate his pre-June 7, 1932, interest in the trust.

5. The Tax Court erred in rendering a decision on the issue in the respects above enumerated, is contrary to controlling law and regulations, and is not supported by the evidence in the case.

Although the Tax Court found it unnecessary to discuss the applicability to this case of Section 812 of the Internal Revenue Code [see Tr. 152], we shall discuss that issue, since the Commissioner is at liberty to rely upon it, if so advised, in endeavoring to sustain the Tax Court's judgment. Our position regarding that issue may be stated as follows:

6. With respect to none of the property transferred to the trust by the decedent to the trust prior to June 7, 1932, included in decedent's gross estate by the Tax Court, was the enjoyment thereof as of the date of decedent's death subject to any change through the exercise of the power either by the decedent alone, or in conjunction with any person, to alter, amend or revoke. Section 302(d), Revenue Act of 1926; Section 812 of the Internal Revenue Code (I. R. C.)

The same comments apply to Section 302(c) of the Revenue Act of 1926, as amended by the Joint F

the property or the income therefrom. (See)

appendix to this brief, we quote the statutes and s pertinent to the present controversy; also congressional committee reports which may have a pon it.

A Preliminary Matter.

proceeding with our main argument, we direct to a general principle to which full allegiance ps not been accorded in this case. We refer to hat the taxpayers are not here claiming an ex- r a deduction, therefore coming within the cases at under such circumstances the burden is on yer to establish his right to the exemption or claimed. *Interstate Transit Lines v. Commis-* 9 U. S. 590, 593, 87 L. Ed. 1607, 63 S. Ct. 43; deduction); *Commissioner v. Jacobson*, 336 , 49, 93 L. Ed. 477, 69 S. Ct. 558 (1949;). For a criticism of the rule, see Note, Erwin old, 56 Harv. L. R. 1142 (1943).

other hand, this is a case where the doubt or arises from the statute itself and the coordinate , leaving it uncertain whether the taxpayer hin the scope of the taxing statute at all. Under umstances, the applicable rule of construction doubt exists as to the construction of a taxing

Of the numerous cases announcing the rule just we note the following: *McFeely v. Commissioner*, 284 U. S. 102, 111, 80 L. Ed. 83 (1935); *Old Colony Road Co. v. Commissioner*, 284 U. S. 552, 76 L. Ed. 56 S. Ct. 54 (1932). The Court says (p. 561), to a discussion just concluded as to meaning of "interest":

"If there were doubt as to the connotation of the term, and another meaning might be adopted, the fact of its use in a tax statute would incline us to the construction most favorable to the taxpayer. (Citing authorities.)"

In the construction of the 1931 statute (see p. 1), as applied to the present case, we are not prepared to claim for ourselves certainty, nor can we put that position to the Commissioner. If it be granted that the case is borderline, we are still in a position to give the protection afforded by the salutary principle stated above. The scope of the 1931 amendment is as restricted. The purpose of the 1932 amendment was to reach cases not covered by the 1931 Joint Resolution (see quotation from the Committee reports, Appendix). As to other changes made at the same time, the Committees said they were only "clarifying." But the words "or for any period not ascertainable without reference to his death" (App. p. 1) are not described as clarifying. The insertion of these words marked a change in the law, intended to include an entire category of trusts not theretofore included. We consider it reasonable to believe that the Selznick trust con-

ARGUMENT.

Principal point involved may be condensed into
ing: The Commissioner contends that under
29, 1932 trust created by Selznick, he retained
e for his life; the taxpayers (petitioners) con-
under the terms of this particular trust, his
income terminated *before* his death, rendering
er not taxable under the statute then in effect
ch 3, 1931, pre-June 7, 1932).

Questions presented in the instant case may be
ly discussed under the following outline:

the assets transferred by the decedent to the
9, 1932 trust, prior to June 7, 1932, includible
gross estate because of retention by him of the
therefrom?

Did the decedent retain the right, either alone
in conjunction with any person, to designate the per-
son who shall possess or enjoy the property or the income
therefrom?

Were any of the transfers made to the January 29,
1932 trust, subject to the power of the decedent, either
alone or in conjunction with any person, to alter, amend
or terminate?

Were the proceeds of insurance policies assigned by
the decedent to the January 29, 1932 trust, prior to June
7, 1932, includible in the gross estate?

Are the Assets Transferred by the Decedent January 29, 1932 Trust, Prior to June 7, 1932, Includible in the Gross Estate Because of a Contribution by Him of the Income Therefrom?

Matters relating particularly to insurance policies transferred to the trust prior to June 7, 1932, will be discussed under heading No. 3.

The taxability of the pre-June 6, 1932 transfers is to be governed by Section 302(c) of the Revenue Act of 1926, as amended by the Joint Resolution of June 3, 1931 (App. p. 1), and before its amendment by Section 803(a) of the Revenue Act of 1932 (App. p. 1). Such amendments are not retroactive (*Hassett v. Commissioner*, 308 U.S. 1, 100 F. 2d 100, 101, 32 AFTR 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000).

We have then to consider whether the transfers made prior to June 7, 1932, come within the following definition of Section 302(c) (quoted in full, App. p. 1):

“* * * a transfer under which the transferor has retained *for his life or any period not exceeding ten years before his death* (1) the possession or enjoyment of, or the income from, the property * * *.”

Two provisions of the trust [Tr. 43-66] require consideration here. The first is Article VII [Tr. 50-51].

“This trust is irrevocable. The entire income received and derived from the trust estate shall be available for distribution hereunder shall be by s

, however reserves the right to direct the Trust-
from time to time to credit, keep and add any
all income which, pursuant to the terms hereof,
be payable to him, to the principal of the corpus
the trust estate, by giving written instructions
time to time so demanding."

Another provision important here is the first portion
of Section XIII [Tr. 63]:

*Any income accrued or undistributed at the ter-
mination of any trust or estate hereunder, shall be-
come and go to the beneficiary or beneficiaries entitled
to the next eventual estate, in the same proportions
as the principal hereof, * * *."*

The income was to be "paid monthly or in other
periodic installments as directed by the Trustor," to
the decedent. His interest in the trust terminated at his
death and income then accrued or undistributed was to
be paid and go to the beneficiary or beneficiaries entitled
to the next eventual estate."

The effect of these provisions is, first, that the income
was payable to decedent, but only in installments, and
second, that there would be some amount of income be-
fore the last installment paid to the decedent and the
time of his death. This income would go *not to the de-
cedent* but to the beneficiaries next in line.

The actual practice conformed with what the trust
agreed to indicate. The income was in fact paid in install-
ments at intervals being not less than once a month
or longer [Ex. 11-K, Tr. 67-68]. On the date

facts, the decedent did *not* retain "*for his life*" period not ending before his death" the "possibility of enjoyment of or the income from" the property retained the right to income only for a period which was to end *before* the end of his life. Therefore, in the language of Section 302(c), as it read on January 1, 1932, the transfer was not taxable.

Our construction of Section 302(c), as amended by the March 3, 1931 Joint Resolution, is confirmed by the Congressional Committee Report relating to the amendment which was made in 1932 to do away with the very situation of which a typical instance is given here. That construction is also confirmed by the Regulations (App. pp. 6-7). The reports of the House Means Committee and Senate Finance Committee (App. p. 8) illustrate the *kind* of situation, but not the *only* situation which the amendatory Act was intended to cure (1939-1 C. B., Part 2, pp. 490, 532):

"(1) The insertion of the words 'or for a period not ascertainable without reference to his death,' is to reach, for example, a transfer of property by a decedent reserved to himself *semiannual* payments of the income of a trust which he had established *but with the provision that no part of the income should come between the last semiannual payment and his death should be paid to him or his estate* or where he reserves the income, not neces-

s not merely a clarifying amendment—a conclusion emphasized by the fact that the above paragraph is followed by the following sentence:

certain new matter has also been added, which has no retroactive effect.” (App. p. 8.)

a series of paragraphs (see App. pp. 8-9) of which the one under consideration is number (1), and numbers (2) and (3) are described as clarifying amendments which did not represent new matter, but paragraphs (4) and (5) are not so described. Congress knew what it was doing. It knew that the change in the requirement of income for life was new and that it could not be applied to transfers before June

Section 105, Section 81.18 (quoted App. pp. 6-7) as an illustration the case of income reserved, payable annually, with income after the last of such installment to a succeeding interest, inferring that such transfers do not fall within the language of the 1931 Joint Resolution. (The inference was perhaps plainer prior to the March 8, 1951 amendment to Section 81.18, but the language of the present regulation is believed to be the same.) A transfer of the type just mentioned is not taxable when made *after* June 6, 1932.

It is clear then that both Congress and the Treasury recognized that situations of a type closely re-

exact period of the installment payments provided by the trust has no significance. The Congressional committees mention semi-annual installments and the Treasury Regulations mention quarterly payments. The three months difference was not considered important in principle, there can be no difference between three or six months and the monthly or other convenient installments provided for in the Selznick trust. In one case as in the other, the title to the income passes after payment of the last installment to the trust in him or his estate.

Does it make any difference that the income is to be "paid monthly or in other convenient installments as *directed by the Trustor*"? We submit that it does not because no direction of the trustor given pursuant to the authorization could direct the income to be paid other than in installments. "Installment" is defined in Webster's New International Dictionary, Second Edition as follows:

"A portion of a debt or sum of money payable in portions divided into portions that are made payable at different times."

It is plain both from the common sense understanding of the term installment and the dictionary definition that the income had to be payable in "portions" and that the portions had to be "payable at different times."

The trustee was evidently unwilling to give the blanket authority respecting the interval between installments. "Monthly" is considered typical or convenient, but "convenient" is established as a controlling factor in any event.

A practical construction put upon the provision benefits the parties over a long period of years, making the income payable not more often than monthly [Ex. 11-K, Tr. 67-68], is in accordance with this construction. In no case were longer periods elapsed in most instances. For example, no payment was made between September 3, 1937, and November 11, 1940, nor between November 8, 1940, and November 8, 1942, that being the last payment received by the trustee [Ex. 11-K, Tr. 67-68].

On the fact that the income was payable only in installments, it follows that an interval had to elapse between the date of the last installment and the death of the decedent. This income, pursuant to Article XIII, was payable to the decedent or his estate, but to the next of kin or interest under the trust, thereby preventing the exercise of the retention by the decedent "for his life or for a period not ending before his death" of the income derived from the property.

In heading No. 2, we shall recite something of the history of what are now Sections 811(c) and (d) of the Internal Revenue Code (formerly Sections 302(c)

in these statutes as they were originally enacted they were amended from time to time. The closing of these gaps by Congress was necessitated by the fact that the courts did not anticipate the will of Congress to undertake by construction to write into the law an exception which was not expressed, but on the contrary to fill the gaps in the statutes as they were written even though Congress was in some cases to grant tax benefits which the Government hoped and desired, perhaps intended, should be conferred. So here, the March 3, 1931 Joint Resolution was intended to close the very considerable "hole" left by *May v. Heiner*, 281 U. S. 238, 75 S. Ct. 286, 50 S. Ct. 286 (1930), reaffirmed in *Mohr v. Burnet*, 283 U. S. 783, 75 L. Ed. 1412, 51 S. Ct. 100 (Mar. 2, 1931). See *Hassett v. Welch*, *supra*, which reviews the history of the Joint Resolution and which have referred to this case (p. 7, *supra*) on the ground that doubts—and regarding this very statute—were resolved in favor of the taxpayer. Whatever the result with which the Joint Resolution of March 3, 1931, passed, it failed to cover the situation where although the income was reserved by the grantor, the reservation was for a period less than his life, leaving the income to be derived from the transferred property between the time of the last payment to him and the date of his death to someone other than himself or his estate. As we have the unimpeachable testimony of both

te upon this ground unless recent events have
he law in a respect unfavorable to trusts of this

ings us to *Commissioner v. Church*, cited page
upon which the Commissioner continued to
e Tax Court, even after it had been overruled
troactive application, by the 1949 legislation
section (b) of that Act, quoted App. p. 3).
t of that statute is that the retention of income
in the case of a decedent dying, as Selznick did,
January 1, 1950, apply to

2) a transfer made after March 3, 1931, and
to June 7, 1932, unless the property transferred
d have been includible in the decedent's gross
e by reason of the amendatory language of the
resolution of March 3, 1931." (App. p. 3.)

statute puts the law back exactly where it was
e *Church* case was decided as far as the present
ncerned. Except hesitantly and subject to doubts
ingenuity can dispel, it cannot be said that the
transferred by Selznick was includible by rea-
e amendatory language of the Joint Resolution
n 3, 1931. It follows that the Selznick trust,
within the 15-month interval between March 3,
d June 7, 1932, does not constitute a part of his
ate for estate tax purposes. We are speaking

- (a) Did the Decedent Retain the Right, Either or in Conjunction With Any Person, to designate the Persons Who Shall Possess or the Property or the Income Therefrom?
- (b) Are Any of the Transfers Made to the 29, 1942 Trust Subject to the Power of Decedent, Either Alone or in Conjunction With Any Person, to Alter, Amend or Revoke?

These two points are governed by the same conditions and will be discussed together.

The trust in express terms is irrevocable [s. VII, Tr. 53]. The trustor reserves the power to make investments during his lifetime [Art. III, Tr. 40]. His consent is also required to the improvement of property subject to the trust [Art. III, Tr. 40]. The trustor reserves the right to change or substitute from time to time the charitable institutions which are given contingent rights in remainder [Art. VIII, Tr. 58]. The consent of any two of the following, namely, the trustee, David O. Selznick, and Loyd Wright, is required to cause insurance policies to be cancelled, the cash surrender value received on cancellation to be added to the corpus of the trust [Art. XI, Tr. 62].

As to the power to change the charitable contingent remaindermen, this would be an exempt power

reserved, all of them administrative, are of no
force as far as the present issue is concerned
Re v. Northern Trust Co., 278 U. S. 339, 73
410, 49 S. Ct. 123, 7 AFTR 8841 (1929);
Re H. S. Downe, 2 T. C. 967 (1943; app. dism.
; *Estate of Geo. W. Hall*, 6 T. C. 933 (1946;
Re Prange's Will, 201 Wisc. 636, 231 N. W. 271

ally provision which can evoke controversy is the
t, constituting the first paragraph of Article XI
:

Notwithstanding the fact that this Declaration
Trust is irrevocable, the Trustor, for himself and
behalf of the beneficiaries, reserves the right to
ion any court of competent jurisdiction at any
and from time to time to amend and/or con-
e the same; provided, however, that no amend-
t shall change the provisions of this trust which
have the effect or which is intended to or shall
e the same to be construed to be or amend it to
revocable trust rather than an irrevocable one."

tee is entitled to petition a court to amend or
the trust. Not only trustees but individuals may
the Court to do anything, although the Court
accede to their petitions. The reserved power to
is nothing more than would be implied in the
of a provision for it. The law writes such a
er into every trust. A Court of equity has au-

tation from *Estate of Van Deusen*, 30 Cal. 2d 2
182 P. 2d 565 (1947):

“* * * A court of equity may modify
on a proper showing of changed conditions o
after the creation of a trust if the rights o
beneficiaries may be protected. (*Whitting*
California Trust Co., 214 Cal. 128, 134 [
142]; *Adams v. Cook*, 15 Cal. 2d 352, 358
2d 484]; *Moxley v. Title Insurance & Trust*
Cal. 2d 457, 466-467 [165 P. 2d 15]; s
Trusts, Secs. 167, 168; Scott on Trusts, S
168.)”

Similarly, a Court of equity has power to “c
a trust. In *Curtin v. Krohn*, 4 Cal. App. 131,
Pac. 243 (1906), the Court said:

“A trustee may always apply to a court o
for aid or directions, and such courts are
open to any of the other parties when a di
to the existence, character, or terms of
arises.”

Restatement, Trusts, Section 259, Comment a.

“a. *When trustee entitled to instruction*
trustee is entitled to instructions of the
respect to such matters as the proper con
of the trust instrument, the extent of his
and duties, who are beneficiaries of the tr
character and extent of their interests, the a
or apportionment of receipts or expenditures
principal and income, the persons entitled to
come or to the trust property on the termin

trustee to incur the expense of making the application (see Sec. 245)."

Section 165, Comment *i*:

Application to court. If the trustee is in doubt whether performance is possible, he may apply to proper court for instructions (see Sec. 259). The court will direct or permit the trustee to deviate from a term of the trust if it appears to the court that compliance is impossible."

Section 167, Comment *a*:

Change of circumstances. If owing to circumstances not known to the settlor and not anticipated by him compliance with a specific direction of the settlor would defeat or substantially impair accomplishment of the purpose of the trust, the court will permit or direct the trustee not to comply with the specific direction. This is true even though provided by statute that every conveyance by a trustee in contravention of the trust shall be absolutely void."

authorities: *Peach v. First National Bank*, 247 U.S. 25, 25 S. 2d 153 (1946); *Security-First National Bank v. Millar Realty Co.*, 217 Cal. 277, 18 P. 2d 339 (1944); *Hallinan v. Hearst*, 133 Cal. 645, 66 Pac. 17 (1902); *Gibault Home v. Terre Haute First National Bank*, 17 Ind. 410, 85 N. E. 2d 824 (1949); see also *Trusts*, Sections 165, 167, 259.

cannot be certain as to the reasons for the insertion of the first sentence of Article XI.

problems arising under the trust to a Court for determination. This relates to procedure only, not to substantive rights. In the *Van Deusen* case, *supra*, proceedings were initiated by the beneficiaries, not the trustee. Although the relief was not granted, the procedure was regarded as proper.

Similarly, and further illustrating the point that a trustor's reservation concerns procedural matters, we note the matter of suits for redress of breaches of trusts. Although such suits are ordinarily brought by the beneficiary, we have the authority of the Supreme Court of the United States for the proposition that a trustor can maintain an action for relief in such cases. Justice Cardozo says in *Burnet v. Wells*, 289 U. S. 679-680, 77 L. Ed. 1439, 53 S. Ct. 761 (1933):

"* * * The rights and interests there created [in taking out a life insurance policy] generated by the contract inhere solely in those who are to receive the proceeds. They inhere also in the insured who by his operation with the insurer has brought the contract into being. If the Minneapolis Trust Company, as trustee, were to refuse to apply the income for the preservation of the insurance, the insured could maintain a suit to hold it to its duty."

Other cases recognizing the rights of the trustor in such circumstances are *Carr v. Carr*, 185 Ia. 12, 165 N. W. 785 (1919); *Abbott v. Gregory*, 39 M. 1 (1878).

There is nothing in Article XI which atte

make no difference. The decedent had no leg-
power. He could confer no power on the Court
did not already have. And the power, wherever
from, was in the Court and not in the decedent.
word in Article XI or elsewhere in the trust re-
power *to the decedent* to amend or take any
ion with respect to possession or enjoyment of
erty placed in this irrevocable trust—a point em-
by being twice mentioned in the first sentence
e XI.

Overing v. Helmholtz, 296 U. S. 93, 80 L. Ed. 76,
68 (1935), the Supreme Court made it clear that
on of this kind, merely permissive of what can be
ler the state law without such a provision, does
il taxability. In that case the question arose
ction 302(d) with respect to a provision in the
t all beneficiaries acting together, by signing a
could revoke it. Holding that this did not make
e, the Court said (p. 97):

* * * This argument overlooks the essential
rence between a power to revoke, alter, or amend,
a condition which the law imposes. The general
is that all parties in interest may terminate the
t. *The clause in question added nothing to the*
ts which the law conferred. Congress cannot
as a transfer intended to take effect in posses-
or enjoyment at the death of the settlor a trust

The history of Sections 302(c) and 302(d) 1926 Act (now Secs. 811(c) and (d)), I. R. C. that in the process of broadening the application sections, the attention of Congress has been solely to the activity of *persons*, not of *courts*. the 1924 Act, trusts amendable or revocable or the consent of persons adversely interested were of the taxable estate. *Reinecke v. Northern Trust* 278 U. S. 339, 73 L. Ed. 410, 49 S. Ct. 123, 78-1 USTC ¶8841 (1929); *Blackman v. United States*, 48 Fed. Cl. 362, 30 AFTR 846 (1943); *Estate of Frederick* 45 B. T. A. 120 (1941; acq.; app. dismissed). *C. Estate of Abraham Koshland*, 11 T. C. 904, 910 (1948), aff'd 177 F. 2d 859 (C. A. 9, 1949).

The 1924 Act made transfers taxable where enjoyment was subject "to any change through the exercise of a power either by the decedent alone or in conjunction with any person to alter, amend, or revoke."

We have already commented under heading N on the drastic effect of the change made by the Joint Resolution of March 3, 1931, whereby transfers with powers reserved for the life of the grantor were brought within the Act; also upon the June 6, 1932 amendment to include a limited class of transfers not brought within the 1931 amendment.

The 1936 amendment to Section 302(d)(1)

or's death "to any change through the exercise
er (*in whatever capacity exercisable*) by the
alone or by the decedent in conjunction with
n * * * to alter, amend, revoke or termi-
The italicized words were added to overcome
of *White v. Poor*, 296 U. S. 98, 80 L. Ed. 80,
66 (1935),² and *Helvering v. Helmholz*, 296
80 L. Ed. 76, 56 S. Ct. 68 (1935), *supra*.

bear emphasis that these various changes were
to place additional impediments in the way of
y persons over the trust or other transfer after
ade and to make sure, not only that no benefits
reserved by the grantor, but that he could not
means or in any capacity, whether acting alone
njunction with other persons, adverse or not,
a any way the enjoyment of the property or its
olution. In this series of amendments designed
the authority and privileges of persons respect-
fers, there is no suggestion that Congress in-
any way to abridge, if it *could* do so, the powers
urts of equity have immemorially exercised over
modifying or even terminating them when the
te conditions exist.

court's powers were not enlarged by the privilege
e decedent superfluously reserved. The case is
er for the government than that class of cases

where the grantor has conferred wide discretionary powers, *not on a Court but on a "person"*—a person of such character that *the trustor himself* might be the beneficiary. And yet the government has controlled those cases where the benefits which could be lost might return to the grantor were such that they could not be enforced by no process of law, but were controlled as the trustee in the exercise of an uncontrolled discretion might give him.

In *Commissioner v. Irving Trust Co.* (Beugler, 147 F. 2d 946, 33 AFTR 759 (C. A. 2, 1947)) the trust specified that the trustee in its absolute discretion should have power to pay to the trustor any amount of the corpus of the trust, over a certain minimum which was to be retained. The trust was held not to be a gift under Section 302(c) of the 1926 Act, the Court said (p. 949):

"In a case where the return of any part of the corpus to the settlor will depend solely upon the discretion of the trustee the true test as to its inclusion in the taxable estate of the settlor is whether the trustee is free to exercise his untrammelled discretion, or whether the exercise of his discretion is governed by some external standard which may apply in compelling compliance with the provisions of the trust instrument. If the former, the corpus is not subject to taxation as a part of the settlor's estate."

Estate of Louis Stewart (T. C., Jan. 22, 1945)
14,338(M), 4 T. C. M. 59, app. dism. C. A.
Estate of Milton J. Budlong, 7 T. C. 756, 762
aff'd and rev'd on other grounds; *Industrial*
v. Commissioner, 165 F. 2d 142, 36 AFTR
A. 1, 1947); *Estate of Walter E. Frew*, 8
10, 1244 (1947; acq.).

le is different where the trust sets up an "ex-
ndard" to which the trustee can be compelled
m. *Estate of Virginia H. West*, 9 T. C. 736
aff'd on another point; *St. Louis Union Trust*
Commissioner, 173 F. 2d 505 (C. A. 8, 1949).

present case, there is not, nor can there be any
standard" to which a Court must conform in
on a petition by Selznick. We repeat that so
ection 811(c) is concerned, the case is far
for the taxpayer than the *Irving Trust Co.*
cases cited above.

imilar to the above have been applied where a
amend or terminate has been conferred, the
g agency being independent, not subject to the
control. *Hugh M. Beugler Trusts*, 2 T. C.
d *Irving Trust Co. v. Commissioner*, *supra*;
Edward Lathrop Ballard, 47 B. T. A. 784
eq.), aff'd *per cur.* 138 F. 2d 512, 32 AFTR
2, 1943; *Anna Ball K.*, 34 B. T. A.

Are the Proceeds of Insurance Policies Assisted by the Decedent to the January 29, 1932 Trust to June 7, 1932, Includible in the Gross Estate?

What we have been saying applies also to the insurance in so far as it is involved under Sections 811(a) and (d). In addition, Section 811(g) of the Code (pp. 4-5), dealing expressly with life insurance, is to be considered.

We shall here (A) consider the effect of the tax provisions; (B) analyze the effect of the transfer of the decedent of the insurance to the trust; and (C) see whether by such transfers decedent retained no incident of ownership in the insurance. These subjects will be taken in order.

A. Effect of the Taxing Provisions.

Under Section 811(g)(2), quoted App., pages 1-2, life insurance is includible in the gross estate if (A) the decedent paid the premiums thereon, or (B) possessed at death any of the incidents of ownership. Since Myron paid the premiums indirectly (see Reg. 1.81-27(a)), the taxability of the insurance proceeds depends upon the applicability of Section 404(c) of the Revenue Act of 1942, amended by Section 502 of the Revenue Act of 1950 (App. p. 5). That section provides that as to the portion of the proceeds at

ship in the insurance. (It is agreed that the amount of the insurance attributable to premiums paid on or before January 10, 1941, is taxable [Tr. 41].)

of Decedent's Transfer of Insurance to the Trust.

legal effect of the transfer of the insurance contract must be determined from both the documents of assignment; Exs. 2-B to 10-J, incl., referred to] and the language of the trust itself [Ex. 1-A, 8]. We shall first consider the effect of the assignments and then the trust.

hereby assign, transfer and set over to Citi-National Trust and Savings Bank as Trustee

This general form is used with respect to the insurance contracts:

Mutual Life	\$25,000	Exhibit 2
New York Life	25,000	Exhibit 3
New York Life	25,000	Exhibit 4
New York Life	50,000	Exhibit 5

The New York Life assignments contain authority to the assignee to sell or surrender the

The remaining insurance contracts, listed below, are assigned by a special form which has the same effect as that above described—they represent a complete assignment of all the right, title and interest of the decedent. In addition, they contain more specific language giving the power of the assignee to exercise all options, to borrow on the policy, etc. The insurance contracts for which the assignment form was used are:

Peoples Life	\$25,000	Exhibit 6
Peoples Life	25,000	Exhibit 7
Indianapolis Life	10,000	Exhibit 8
Indianapolis Life	10,000	Exhibit 9
Indianapolis Life	5,000	Exhibit 10

The various assignments involved do not differ in legal effect. All of them are absolute, valid and irrevocable, constituting the assignee the legal owner for all purposes.

Life insurance policies may be transferred in California. At the time of these transfers, California Civil Code Section 2764, provided as follows:

may recover upon it whatever the insured have recovered.”³

van v. Union Oil Co. of California, 16 Cal. 2d 105 P. 2d 922 (1940), the Supreme Court of said:

“neither insurance policies nor rights arising there- are either sacred or ‘untouchable.’ As far as nt consideration is concerned, an insurance policy t a form of contract. An insurance policy in contemplation is property, which can be sold, ed or bequeathed by the owner thereof.”

same effect: *Lewis v. Reed*, 48 Cal. App. 742, 341 (1920); *Blethen v. Pacific Mutual Life In-* o., 198 Cal. 91, 98, 243 Pac. 431 (1926).

ments containing no restrictions or limitations cable and serve to put the assignee in the posi- e assignor as the complete owner, with all his privileges under the policy.

S., Sec. 435a, p. 59:

“the operation and effect of an assignment of an insurance policy are in general, governed by the rules nning to other assignments. The effect of an nment on the insurance contract is controlled e terms and the circumstances of the contract ngment itself. *In the absence of any limitation e assignment, it passes to the assignee all the e of insured*, but the assignee can acquire no er rights than the assignor had at the time of ssignment.” (Emphasis supplied.)

"Under the general rule relating to assignment of the assignee of a life insurance policy standing in the place of the assignor, acquires no other rights than the assignor possessed, and the policy is subject to all the stipulations and conditions in the contract of insurance, and subject to the defenses available at the time of the assignment."

"Reservation or absence of reservation to revoke. The assignee of life policies with any reservation in the assignment of policy has no right to revoke the assignment, acquires no right, and assignment of life policies without reservation to revoke an assignment gives the assignee no right immediately on the assignment subject to the reservation." *titute.*

"Absolute assignment. An absolute assignment of a life insurance policy divests insured of all title to the policy, and vests the beneficial interest in the assignee. The assignor or his representatives are no longer in control of, or interested in the policy or its proceeds, nor does the death of the insured restore title to insured."

Among the many cases applying the rules stated above are the following:

In *Anna Rosenstock*, 41 B. T. A. 635, 637-638 (1914, acq.), the Board held that insurance policies were subject to estate tax where the decedent had assigned them to his wife under circumstances which constituted an assignment. The Board said:

by made a completed, valid and effectual assignment thereof to her. [Citing cases.] *By such unconditional assignment the insured was divested of legal interest in those policies. Also, by such insured's right, reserved in the policies, to change beneficiary was abrogated.*" (Emphasis supplied)

: *Guaranty Trust Co. of New York (David Estate)*, 33 B. T. A. 1225, 1227 (1936; non-*Lincoln National Life Insurance Co. v. Scales*, 582 (C. A. 5, 1933); *Frick v. Lewellyn*, 803, 810, 4 AFTR 4382 (D. C. Pa., 1924), *Lewellyn v. Frick*, 268 U. S. 238, 69 L. Ed. 934, 487 (1925).

authorities establish that by the assignments completely divested himself of all ownership in the contracts, retaining no incident of owner-

ll now consider the provisions of the trust pertaining to the insurance.

primary statement [Ex. 1-A, Tr. 43]:

* * said Trustor has assigned to the said Trustee, as Trustee, certain insurance policies, a copy of which is attached hereto, marked Exhibit and by this reference made a part hereof as if fully set forth."

II [Ex. 1-A, Tr. 44]:

he Trustor agrees that as to the insurance policies delivered to the Trustee or which may hereafter

under to be made payable to the Trustee by designation as beneficiary thereof, or in such manner as the parties hereto and any insured agree, and the Trustee assumes no responsibility for the sufficiency or effect of any instrument by which any policy shall be made payable to it."

Second paragraph, Article XI [Ex. 1-A, Trust Agreement]

"The Trustor reserves the absolute right to cause any policy to be cancelled, and revoke or cause to be revoked, any of the insurance policies hereinbefore provided for, to, or which may hereafter be added to the trust, provided that he first obtain the written consent of any two of the following, to wit: The Trustor, David O. Selznick and Loyd Wright; provided further, that upon any cancellation any cash surrender values received on any such policies, shall be paid in and/or be added to the corpus of this Trust."

It appears therefore that Selznick assigned the power to the trustee and retained no rights in them other than the right with the consent of two independent parties to cause the policies to be cancelled or "revoked," in which case the surrender values were to remain payable to the corpus of the trust in which decedent had no right other than the then innocuous right to income, limited as we have said. This amounted only to a change in the management of the investment of this particular part of the trust. It is to be maintained that this single power retained by the Trustor was merely administrative, coming within the scope of the retention of administrative powers cited above.

Decedent Retained No Incident of Ownership.

is no all-inclusive definition of "incidents of ownership." The regulations (Reg. 105, Sec. 81.27(a)) provide (in part):

For the purposes of this section, the term 'incident of ownership' is not confined to ownership in a technical legal sense. For example, a power to change the beneficiary reserved to a corporation of which the decedent is sole stockholder is an incident of ownership in the decedent. For examples of 'incidents of ownership' see paragraph (c) of this section.

* * * * *

In determining whether the decedent possessed an incident of ownership in a policy or in any part of a policy, regard must be given to the effect of State or other applicable law upon the terms of the policy. * * *

(c) * * *

Incidents of ownership in the policy include, for example, the right of the insured or his estate to receive economic benefits, the power to change the beneficiary, to surrender or cancel the policy, to assign the policy, to revoke an assignment, to pledge it for a loan, to obtain from the insurer a loan against the surrender value of the policy, etc. The insured possesses an incident of ownership if his death is necessary to terminate his interest in the insurance, as,

The examples given bring out in bold relief the difference of any comparable situation here. We need not waste the Court's time in checking off the enumerated items one by one. That none of them is present here is obvious. Since the insured's divestment of all interest in the policy was absolute, he had no interest for the term of the policy which his death was necessary. The regulation in question does not apply.

In *May Billings et al., Executors*, 35 B. T. R. 1152 (1937; acq.), decedent had insurance of which he irrevocably designated the beneficiary (equivalent to an assignment). He did have a right, however, to say *when* the proceeds of the policy should be paid to the beneficiary. Holding that the policies were not his, since the decedent having no interest in them, the Board (p. 1152):

“* * * The mere right to say when the proceeds of the insurance policy should be paid to the beneficiary does not amount to a control of the policy. They irrevocably belonged to the beneficiary from the date the policies were taken out.”

The right retained here—the equivalent of a retained control in control investments—is farther from an “incidents of ownership” than was the right retained in the *May Billings* case. Under our Point 2, we have shown that the right to control investments in a trust is not sufficient to bring the trust into the taxable estate (see *supra*).

That an assignment of insurance contracts

Estate of Louis J. Dorson, 4 T. C. 463 (1944; acq.),
(C. A. 2, 1945), the decedent transferred
insurance policies to a trust which was ir-
revocable and in which he retained no property rights
to change beneficiary interests. Concluding that
decedent had divested himself of all the incidents of
ownership, the Court said (pp. 468, 469):

"As to the policies here under consideration, our
question is whether by transferring them to the
trustees under the trust agreement decedent irrev-
ocably divested himself of all property rights in them,
including the right to change the beneficiaries or to
renew or surrender the policies. If so, then the
proceeds of the policies must be excluded from his
estate. See *Anna Rosenstock*, 41 B. T. A.
101, and cases therein cited.

* * * * *

"In the instant case we think that the uncondi-
tional and irrevocable assignment of the policies to
trustees divested decedent of all the rights therein,
including the right to change the beneficiaries."

The *Dorson* case was followed in *Estate of George F.*
1 T. C. 681, 687 (1947; acq.).

In *Estate of Charles Delany*, 1 T. C. 781 (1943),
decedent had transferred insurance in trust for his daugh-
ter. The trust was irrevocable and no right to alter
the trust was retained. The transfer was held not

See *Point National Bank, Executor*, 39 B. T. A.

from the decedent certain insurance policies. The failed to assign to the trustee all the insurance he owned and those not assigned were held in the estate. He did, however, assign irrevocably of the policies and these were held to be not taxable to the decedent having parted with the incidents of ownership. The Court said (p. 355):

“* * * The insured had no rights in those policies after the date of assignment or when the name of the beneficiary was irrevocably changed.”⁴

In *Pennsylvania Co. v. Commissioner*, 79 F. 2d 16 AFTR 638 (C. A. 3, 1935), cert. denied, 301 U. S. 651, decedent had named his wife as beneficiary of the insurance and reserved no power to change the beneficiary. Having determined that the wife had a vested interest in the policy, and that the decedent, without the consent of his wife as beneficiary, could not, as the beneficiary, surrender the policy or borrow against thereon, the Court held that the insurance was includible in the estate.

Other cases including the proceeds of assignment from the taxable estate because of the absence of incidents of ownership are: *Thomas C. Boswell, Executors*, 37 B. T. A. 970 (1938; acq.); *Amesbury stock*, 41 B. T. A. 635 (1940; acq.); *Estate of*

⁴Held also, the mere right of decedent to receive the proceeds after the assignment did not make the transfer subject to estate tax.

son, 41 B. T. A. 901 (1940; non-acq.), app.
A. 1, 1940; *Estate of James W. Henry*,
ec. 12, 936-G (T. C., Jan. 16, 1943), app. dism.
943.

Conclusion.

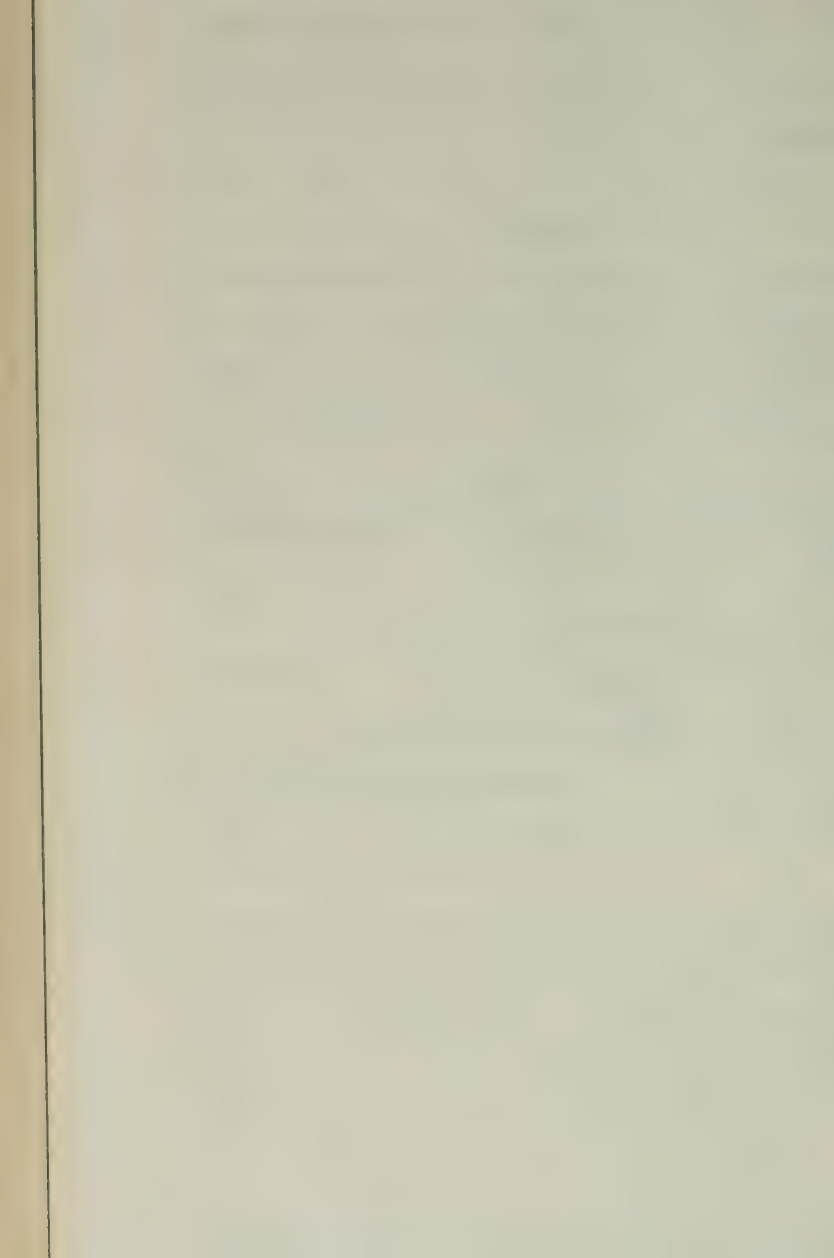
regoining will perhaps serve to point out the
theories and lines of authority on which the
rely to exclude the January 29, 1932, trust.
attempting to anticipate the contentions to be
behalf of respondent, it seems proper to rest
ing argument here, submitting that the case
come within the taxing act as it stood on Janu-
32.

Respectfully submitted,

JOSEPH D. BRADY,

WALTER L. NOSSAMAN,

Attorneys for Petitioners.





APPENDIX.

STATUTES.

302(c), Revenue Act of 1926, as amended by Resolution of March 3, 1931 (in part):

to the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, including a transfer under which the decedent has retained for his life or any period extending before his death (1) the possession or enjoyment of, or the income from, the property or the right to designate the persons who shall possess or enjoy the property or the income there-

* * *."

302(c) was again amended by the Revenue Act of 1932, effective June 7, 1932, to read as follows:

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for a period which does not in fact end before his death (1) the possession or enjoyment of, or the income from, the property (2) the

Section 302(c) of the 1926 Act became Section 2036 of the Internal Revenue Code and was again amended by subsection (a) of the Technical Changes Act of 1949 (October 25, 1949) to read as follows:

“(c) TRANSFERS IN CONTEMPLATION OF DEATH.—
ING EFFECT AT, DEATH.—

“(1) GENERAL RULE.—To the extent of the interest therein of which the decedent has made a transfer (except in case of a bona fide sale for an adequate and full consideration in money's worth), by trust or otherwise—

“(A) in contemplation of his death, if the transfer of a material part of his property is of the nature of a final disposition or disposition thereof, made by the decedent within a reasonable time prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter.

“(B) under which he has retained possession or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death, the right of possession or enjoyment of, or the right to receive income from, the property, or (ii) under which he either alone or in conjunction with another person has the right to designate the persons who shall enjoy the property or the income therefrom.

“(C) intended to take effect in possession or enjoyment at or after his death.”

“(d) REVOCABLE TRANSFERS—

“(1) TRANSFERS AFTER JUNE 22, 1936.—To the extent of any interest therein of which the decedent has at any time made a transfer (except a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was terminated at the date of his death to any change in the exercise of a power (in whatever capacity exercised) by the decedent alone or by the decedent in conjunction with any other person (without regard to whether or from what source the decedent acquired the power), to alter, amend, or revoke, or where the decedent relinquished any such power in connection with the date of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Except in the case of a transfer made after June 22, 1936, no interest in property of the decedent of which he has made a transfer shall be included in the gross estate under paragraph (a) unless it is includible under this paragraph.

Section 811(g) of the Internal Revenue Code, as amended by the Revenue Act of 1942:

“(2) RECEIVABLE BY OTHER BENEFICIARIES.—

To the extent of the amount receivable by other beneficiaries as insurance under policies of life of the decedent (A) purchased with or for consideration, paid directly or indirectly by the decedent, in proportion that the amount paid by the decedent bears to the total pre-

tion with any other person. For the purpose of clause (A) of this paragraph, if the decedent transferred, by assignment or otherwise, a policy of insurance, the amount paid directly or indirectly by the decedent shall be reduced by an amount which bears the same ratio to the amount paid directly or indirectly by the decedent as the consideration in money or money's worth received by the decedent for the transfer bears to the value of the policy at the time of the transfer. For the purpose of clause (B) of this paragraph, the term 'incident of ownership' does not include a reversionary interest.

404(c), Revenue Act of 1942, as amended by 404(b)(3)(a), Revenue Act of 1950 (in part):

Decedents to Which Amendments Apply.—The amendments made by subsection (a) of section 2035 are applicable only to estates of decedents dying after the date of the enactment of this Act [October 3, 1942]; but in determining the proportion of premiums or other consideration paid directly or indirectly by the decedent (but not the total premiums paid) the amount so paid by the decedent on or before January 10, 1941, shall be excluded if at any time after such date the decedent possessed an incident of ownership in the policy. For the purpose of the preceding sentence, the term 'incident of ownership' includes a reversionary interest only if (1) at some time after January 10, 1941, the value of such reversionary interest exceeded 5 per cent of the value of the policy, and (2) the reversionary interest arose by the express terms of

or the proceeds of the policy, (A) may the decedent or his estate, or (B) may to a power of disposition by him."

[Part relating to valuation of interests omitted.]

REGULATIONS.

Reg. 105, Section 81.18 (as amended by T March 8, 1951, to reflect changes made by the Changes Act of 1949):

"TRANSFERS WITH POSSESSION OR E
RETAINED—(a) *General Rule.* Except i
of a bona fide sale for an adequate and
sideration in money or money's wor
811(c)(1)(B) requires the inclusion in
estate of the value of all property transfe
decedent, whether in trust or otherwise,
cedent retained or reserved the use, posse
to the income, or other enjoyment of the
property (1) for his life; or (2) for any
ascertainable without reference to his dea
for such a period as to evidence his int
it should extend at least for the durat
life and his death occurs before the ex
such period. Except as provided in para
of this section, such property is includi
regard to the date when the transfer
whether before or after the enactment of t
Act of 1916.

reservation of the right to receive, in quarterly
payments, the income of the transferred property
none of the income between the last quarterly
payment and the decedent's death was to be received
by or for his estate.³ This expression also included
reservation of the right to receive the income from
transferred property after the death of another per-
son who in fact survived the decedent; but in such
cases the amount to be included in the gross estate
under this section does not include the value of the
remaining income interest in such other person.
However, if such other person predeceased the de-
cedent, the reservation may be considered to be for
the decedent's life or for such a period as to evidence
an intention that it should extend at least for the
remainder of his life.

Use, possession, right to the income, or other
enjoyment of the property will be considered as
not having been retained by or reserved to the decedent
to the extent that during any such period it is to be
applied towards the discharge of a legal obligation
of the decedent, or otherwise for his pecuniary benefit.

If such retention or reservation is of a part only
of the use, possession, income, or other enjoyment
of the property, then only a corresponding proportion
of the value of the property should be included in
determining the value of the gross estate."

Revenue Act of 1932, House Ways & Means
(1939-1 C. B., Part 2, page 457 at 490):

"The purpose of this amendment to section 2036 of the Revenue Act of 1926 is to clarify the respects the amendments made to that section by the joint resolution of March 3, 1931, which was intended to render taxable a transfer under which the decedent reserved the income for his life. The joint resolution was designed to avoid the effect of the decisions of the Supreme Court holding such transfers not taxable if irrevocable and not made in contemplation of death. Certain new matter has been added, which is without retroactive effect.

"The changes are:

"(1) The insertion of the words 'or for a period not ascertainable without reference to his death,' is to reach, for example, a transfer in which the decedent reserved to himself semiannual payments of the income of a trust which he had created but with the provision that no part of the income between the last semiannual payment and his death should be paid to him or his estate where he reserves the income, not necessarily for the remainder of his life, but for a period in the ascertainment of which the date of his death was a necessary element.

rs old, reserves the income for an extended
f years and dies during the term, or where he
ave the income from and after the death of
r person until his own death, and such other
predeceases him. This is a clarifying change
es not represent new matter.

) The insertion of the words 'the right to the
' in place of the words 'the income' is designed
h a case where decedent had the right to the
, though he did not actually receive it. This is
clarifying change.

) The insertion of the words 'either alone or
junction with any person' is to reach a case
decedent had a right, with the concurrence
other person or persons, to designate those
ould possess or enjoy the property or the in-
therefrom."

ort of the Senate Committee on Finance con-
me explanation, verbatim, of the changes made
2 Act (1939-1 C. B., Part 2, page 496 at 532).

1 Changes Act of 1949, Conference Committee
949-2 C. B., page 295 at 296).

g to the 1949 Amendments to Section 811(c),

* * Amendment No. 6 provides that prop-
o transferred before June 7, 1932, shall not be

property unless the transfer was made a
3, 1931, and before June 7, 1932, and i
in his gross estate by reason of the amen
guage of the joint resolution of March 3
Stat. 1516).”

Referring to the privilege of tax-free reli
of certain retained powers or rights, accor
1949 Act:

“* * * The tax immunities provide
conference amendments also apply to a tra
after March 3, 1931, and before June 7,
reservation by the transferor of an inco
which would not render the transferre
includible in his gross estate by reason of t
tory language in the joint resolution of
1931.”

The last two excerpts are quoted only to c
fact, apparent from the 1949 Act itself, that
1949 Congress thought there could be a differ
pre-March 3, 1931, trusts and those created b
date and June 7, 1932.

**the United States Court of Appeals
for the Ninth Circuit**

**MYRON SELZNICK, DECEASED, BANK OF AMER-
ICAN TRUST AND SAVINGS ASSOCIATION, DAVID
SELZNICK AND CHARLES H. SACHS, EXECUTORS,
PLAINTIFFS**

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**ON FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES**

BRIEF FOR THE RESPONDENT

THERON LAMAR CAUDLE,
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L. W. POST,**

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FILED

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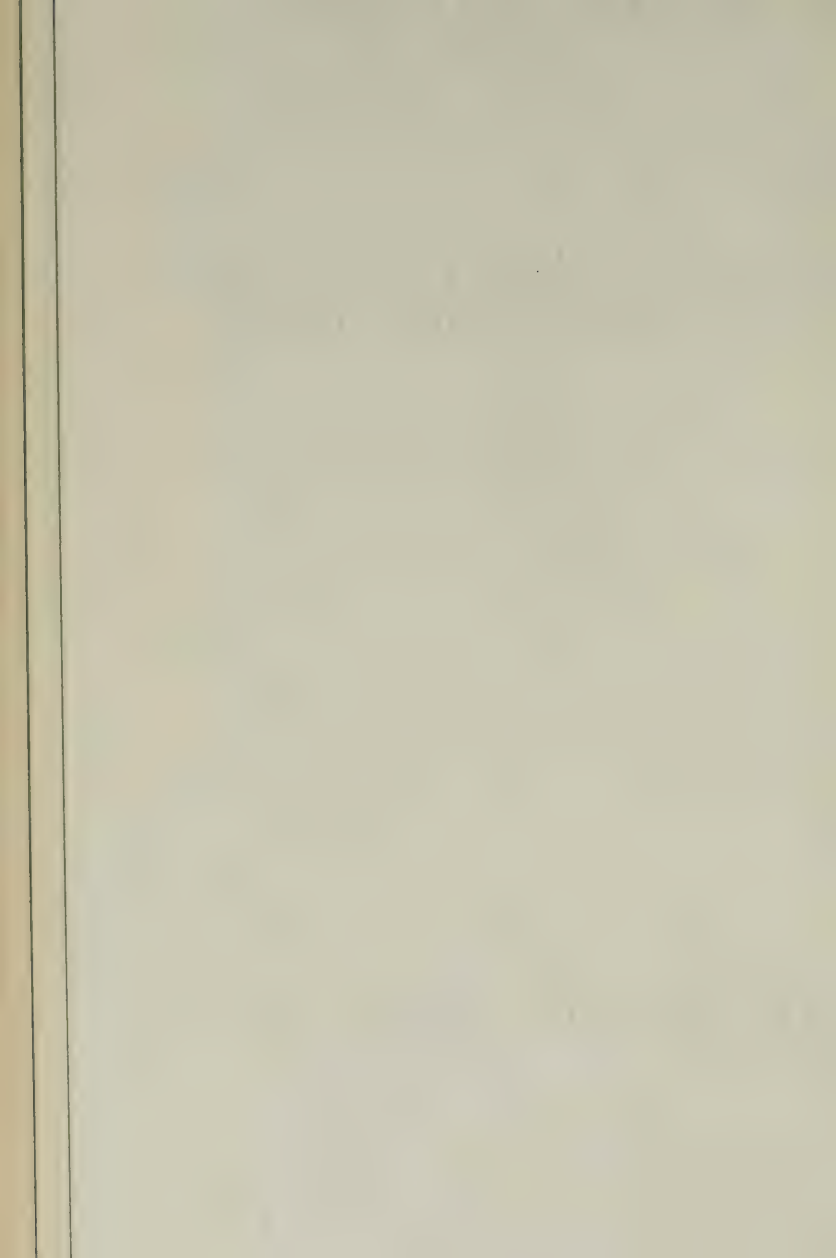
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**the United States Court of Appeals
for the Ninth Circuit**

No. 12980

MYRON SELZNICK, DECEASED, BANK OF AMER-
ICAN TRUST AND SAVINGS ASSOCIATION, DAVID
SELZNICK AND CHARLES H. SACHS, EXECUTORS,
VERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*ON FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES*

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

Memorandum opinion of the Tax Court rendered
1949 (R. 2, 69-74), is unreported. The opinion
of the Tax Court on remand,
dated November 28, 1950 (R. 121-152), are re-
ported 15 T.C. 716.

JURISDICTION

The case involves federal estate taxes. The Commis-
sioner's notice of deficiency (R. 25-30) was mailed to
the taxpayers on or about March 27, 1947. (R. 4, 25,

for redetermination under Section 871 (a) Internal Revenue Code. (R. 1, 3-30.) The case was brought to the Tax Court that there is a deficiency in estate tax of \$199,842.44 was entered on June 7, 1949. The case was then brought to this Court by petition for review filed July 29, 1949 (R. 3, 92-97), pursuant to the provisions of Section 1141(a) of the Internal Revenue Code, as amended by Section 36 of the Act of October 3, 1948. On December 28, 1949, this Court entered a mandate vacating that decision and remanding the case to the Tax Court for further consideration pursuant to the stipulation of the parties. (R. 10, 11-12.) After further proceedings, and on April 3, 1950, the Tax Court entered its decision pursuant to the stipulation that there is an overpayment in estate tax in the amount of \$12,108.22, which amount was paid after the filing of the notice of deficiency. (R. 152-153.) The case is now brought to this Court by petition for review filed May 25, 1951 (R. 155-160), pursuant to the provisions of Section 1141(a) of the Internal Revenue Code, as amended.

QUESTION PRESENTED

Whether assets transferred by the decedent on June 7, 1932, to a trust created by him on January 1, 1932, should be included in his gross estate for the purposes of the federal estate tax under Section 2036(d) or (g) of the Internal Revenue Code.

STATUTES AND REGULATIONS INVOLVED

These are set out in the Appendix, *infra*.

STATEMENT

The Tax Court found the following facts (R. 134):

state tax return of the decedent was filed with
tor of Internal Revenue for the Sixth District
nia on June 22, 1945. (R. 124-125.)

January 29, 1932, the decedent created a trust
ne Citizens National Trust and Savings Bank
angeles as trustee. (R. 125.)

II of the trust agreement reads as follows (R.

e Trustor agrees that as to the insurance
es delivered to the Trustee or which may here-
be delivered to it:

cause each and every policy intended to be
subject to this agreement and the trusts here-
r to be made payable to the Trustee by suffi-
designation as beneficiary thereof, or in such
manner as the parties hereto and any insurer
agree, and the Trustee assumes no responsi-
for the sufficiency or effect of any instrument
reement by which any policy shall be made
ble to it.

III of the trust agreement provides, in part
26):

ring the lifetime of the Trustor, Myron Selz-
no sale or exchange of property which may at
ime comprise the principal of the trust estate,
o change in the investments of the principal of
rust estate, shall be made by the Trustee ex-
on the written order and direction of said
tor or his duly authorized agent, ,
said Trustor during his lifetime hereby re-
s for himself and/or his agent to be designated
time to time, the right to direct, in writing,
Trustee as to the investment of all cash prin-
in any securities and/or property whether or
ne same may be approved and permissible by

filed with the Trustee, to revoke said appointment of David O. Selznick and/or Loyd Wright substitute other persons to act for and David O. Selznick and/or Loyd Wright, capacities herein in this paragraph provided them to act.

Article VI of the trust agreement provides (R. 126):

* * * [The trustees] shall, after sufficient or other securities have been deposited in so that the income therefrom shall be (until such time the Trustor agrees to premiums himself), also pay any and all on life insurance policies and/or contracts may be transferred and/or delivered by the to the Trustee pursuant to the terms hereof.

Article VII of the trust agreement reads (R. 126-127):

This Trust is irrevocable. The entire income received and derived from the trust estate available for distribution hereunder shall be said Trustee paid monthly or in other convenient installments as directed by the Trustor, Myron Selznick for and during his lifetime; Myron Selznick, however, reserves the right to direct the Trustee from time to time to credit and add any and all income which, pursuant to the terms hereof, may be payable to him, to the principal of the corpus of the trust estate, in accordance with written instructions from time to time hereafter mandating.

Article VIII of the trust agreement reads as follows (R. 127):

the trust estate and available for distribution under shall go and be paid by said Trustee in monthly installments, as follows: [There are various provisions for the distribution of trust income to the decedent's widow, daughters, parents, brothers and their children and a final provision for termination of the trust and distribution of the corpus and for remainder to charity on failure of any of the heirs surviving.]

VIII further provides that (R. 127) :

The Trustor reserves the right to change or substitute, from time to time, the said charitable institutions, by giving notice of such change or substitution to the Trustee in writing.

XI provides as follows (R. 128) :

Notwithstanding the fact that this Declaration of Trust is irrevocable, the Trustor, for himself and on behalf of the beneficiaries, reserves the right to petition any court of competent jurisdiction at any time and from time to time to amend and/or confirm the same; provided, however, that no amendment shall change the provisions of this trust which have the effect or which is intended to or cause the same to be construed to be or amend a revocable trust rather than an irrevocable

The Trustor reserves the absolute right to cancel any insurance policy to be cancelled, and revoke or cause to be cancelled, any of the insurance policies herein referred to, or which may hereafter be added to this trust, provided that he first obtain the written consent of any two of the following, to wit: The Trustors, David O. Selznick and Loyd Wright; provided, however, that upon any cancellation any cash surrender values received on any such policies, shall

Any income accrued or undistributed amination of any trust or estate hereunto belong and go to the beneficiary or beneficiaries titled to the next eventual estate, in the proportions as the principal hereof, provided ever, that it is an express condition of herein created, which shall take precedence any and all other provisions herein relating to the distribution of the trust estate, that the Trustee is authorized and empowered and may in its absolute discretion, although it is not obligated to do, from the net income and/or principal of the trust estate and in such manner as to it may seem equitable and just, pay a reasonable sum for the defraying either in whole or in part the expenses of the last illness and of the funeral of the decedent and/or any specifically named or contingent beneficiary or beneficiaries under said Trust.

The decedent transferred assets to the trust as follows:

On January 29, 1932, decedent transferred to the trust assets (other than life insurance contracts) having a value on the date of decedent's death of \$951.83. After June 6, 1932, decedent transferred to the trust, assets (other than life insurance contracts) having a value on the date of decedent's death of \$817.79, which amount it is stipulated and agreed that, in the event of the death of decedent, is properly includible in decedent's gross estate (and which represents \$28.81 more than the amount reported in the estate tax return on account of the interest on the trust). (R. 129.)

Decedent also assigned to the trust, prior to January 29, 1932, life insurance contracts owned by him.

proceeds of the life insurance contracts, date of decedent's death, were \$188,275.31, of which portion allocable to premiums paid prior to January 10, 1941, was \$148,805.10, and the portion allocable to premiums paid after that date was \$39,470.21. In other words, the net sum, it is stipulated and agreed, is in any event includible in decedent's gross estate (and which exceeds by \$62.63 more than the amount reported in the tax return on account of the insurance). (R. 130.)

Set forth in the declaration of trust, the net income of the trust was to be paid to Myron Selznick. The trustee paid various amounts to the decedent from time to time as set out on pages 130-132 of the record.

At the date of decedent's death there were \$1,138.36 of net income on hand with the trustee which had not been distributed and which had not been distributed to the decedent. (R. 132.)

The Commissioner determined in the notice of deficiency that all of the property transferred by the decedent to the trust created on January 29, 1932, should be included in the gross estate of the decedent pursuant to Section 811(c) of the Internal Revenue Code. (R. 132.)

On April 1, 1949, the Tax Court entered a memorandum opinion which sustained the Commissioner's inclusion of the gross estate under Section 811(c), Internal Revenue Code, of certain property transferred by the decedent to the trust. That memorandum opinion was the case of *Commissioner v. Estate of Church*, 16 TC 632. On June 3, 1949, a decision of the Tax Court was entered that there was a deficiency in estate tax of \$99,842.44. The taxpayers appealed to this Court. (R. 123.)

In the proceedings in this Court the parties stipulated

cedent, pursuant to Section 811(c), (d) of the Internal Revenue Code.

The Tax Court held that the property should be included in the decedent's estate under Section 811(c) and based its decision solely on the *Church* case (*Commissioner of Church*, 335 U. S. 632). The Tax Court's opinion was entered herein on October 25, 1949. Since that time Section 811(c) has been amended and the rule of the *Church* case has been affected by the amendments. See Act of October 25, 1949, Public Law 378, 81st Cong., 1st Sess. Under the circumstances it seems appropriate that the decision of the Tax Court be vacated and the case be remanded to it for further proceedings.

Accordingly it is hereby stipulated that the decision below should be vacated and the case be remanded to the Tax Court for further consideration in the light of the above-mentioned amendments to Section 811(c), and also subdivisions (d) and (g).

* * * *

This Court remanded the proceedings to the Tax Court. (R. 123.) The nature of the cause under consideration is set forth therein, in part, as follows (R. 123):

* * * on stipulation of counsel for the parties that the decision of the Tax Court be vacated and the cause remanded to the Tax Court for further consideration:

On Consideration Whereof, It is now considered and adjudged by this Court that the decision of the said Tax Court of the United States in the above cause be, and hereby is vacated, and that the case be, and hereby is remanded to the Tax Court of the United States for further consideration in the light of the amendments of October 25, 1949, to the Internal Revenue Code.

and the Tax Court held (116, 131-132) that assets here involved are includible in the decedent's gross estate for purposes of the federal estate tax.

SUMMARY OF ARGUMENT

The Tax Court's decision is correct and can be supported only by the reasoning in the opinion but upon the grounds set out in this brief.

Under the rights and powers retained by this decedent over the assets he placed in trust, all of those assets (both non-insurance and insurance) are includible in the decedent's gross estate under Section 811(c) or (d) of the Internal Revenue Code, and the insurance is also includible under (g).

ARGUMENT

I

Assets Here Involved Are Includible in the Grantor's Gross Estate under Section 811(c) of the Code, as

In this case was first before the Tax Court it held that the property in question should be included in the decedent's gross estate for purposes of the federal estate tax under Section 811(c) of the Internal Revenue Code and it relied upon *Commissioner v. Estate of* 35 U. S. 632, in that connection. (R. 74.) As pointed out above, Section 811(c) was amended by the Technical Changes Act of 1949. The rule of the *Church* case was affected by the amendments. Therefore, the parties stipulated for a remand and pursuant to the stipulation this Court remanded the case to the Tax Court for further consideration in light of the amendments to Section 811(c), subdivisions (d) and (g) of the Internal Revenue

erty in question is includible in the grantor's estate, basing its decision as to the income tax on the property (referred to as the non-insurance assets) on Section 811(c) and its decision as to the insurance assets on Section 811(g) of the Code. (R. 146, 147. The Tax Court did not find it necessary to consider the applicability of subdivision (c) to the insurance assets (R. 151) or to consider subdivision (d) at all (R. 152).

We submit that the result reached by the Tax Court is entirely correct and justified by its reasoning, as well as by other considerations which will hereinafter be outlined. This section of our brief will be confined to a consideration of the provisions of Section 811(c) of the Code. The Tax Court's conclusions that the provisions of Section 811(c) which the Tax Court correctly concluded are applicable to the non-insurance assets, and which provisions are also applicable to the insurance assets as well.

Section 811(c) (1) (B) of the Code, as amended by the Technical Changes Act, provides for the inclusion in the decedent's gross estate of the value of the property donatively transferred by the decedent if the decedent retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (i) the right to the possession or enjoyment of, or the right to the income from, the property, or (ii) the right, either alone or in conjunction with any person, to designate the person who shall possess or enjoy the property or the income therefrom. The Technical Changes Act further provides that the amendments shall apply to transfers made after 1939 as follows:

SEC. 7. TRANSFERS TAKING EFFECT AT DEATH.

*

*

*

*

(b) The amendment made by subsection (b) shall be applicable with respect to estates of decedents dying after February 10, 1939. The

otherwise specifically provided in such section or following sentence) apply to transfers made before, or after February 26, 1926. The provisions of section 811(c)(1)(B) of such code shall in the case of a decedent dying prior to January 1, 1950, apply to—

- 1) a transfer made prior to March 4, 1931; or
- 2) a transfer made after March 3, 1931, and prior to June 7, 1932, unless the property transferred would have been includible in the decedent's gross estate by reason of the amendatory language of the joint resolution of March 3, 1931 (Stat. 1516).

* * * * *

In the instant case the decedent died in 1944 and the question were transferred to the trust after March 3, 1931, and prior to June 7, 1932. Therefore, as to Section 811(c) turns on whether the property transferred would have been includible in the decedent's gross estate by reason of the amendatory language of the joint resolution of March 3, 1931, c. 1516. This is as follows:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the first sentence of subdivision (c) of section 302 of the Revenue Act of 1926 is amended to read as follows:

(c) To the extent of any interest therein of the decedent has at any time made a transfer, trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property (2) the right to designate the persons who shall

quate and full consideration in money or
worth."

At this point it seems appropriate to make a statement with respect to the joint resolution pointed out in *Hassett v. Welch*, 303 U. S. 307, which was expressly designed to overcome the effect of *Heiner*, 281 U. S. 238, and other cases for the retention of life income (e.g., *Burnet v. Northern Trust Co.*, 283 U. S. 782; *v. Burnet*, 283 U. S. 783; *McCormick v. Burnet*, 283 U. S. 784) which held that the retention of life income for life of the grantor of a trust was not alone sufficient to support taxation of the transfer as one in which the grantor took effect in possession or enjoyment at or after the grantor's death. The joint resolution was recodified in substance by Section 803(a) of the Revenue Act of 1932, c. 209, 47 Stat. 169, with but "slight verbal differences." See *Hassett v. Welch*, *supra*, p. 307. The joint resolution and Section 803(a) of the Act of 1932 were made retroactively applicable to transfers made prior to the enactment, and they applied only prospective to transfers with reservation of life income made subsequent to the dates of their adoption (March 3, 1932, and June 6, 1932), respectively. *Hassett v. Welch*, 303 U. S. 307; *Helvering v. Bullard*, 303 U. S. 297; *Commissioner v. Clise*, 122 F. 2d 998 (C. A. 9th), certiorari denied, 303 U. S. 821. The provisions of the joint resolution as amended by 803(a) were carried forward in the Internal Revenue Code (Section 811(c)) and since 1939 above they have also been continued by the Technical Changes Act. However, as also pointed out in the Technical Changes Act does recognize a distinction between the joint resolution and 803(a) and points out that connection that a transfer made after

on this distinction, the taxpayers say (Br. case is without the scope of the joint resolution it would be covered by the 1932 amendments. Bank taxpayers are relying on a shadow that is substance and the Tax Court correctly so held. 46.)

In connection the Tax Court referred (R. 138) following pertinent provisions of the trust:

* * The entire net income received and derived from the trust estate and available for distribution hereunder shall be by said Trustee paid wholly or in other convenient installments as directed by the Trustor to Myron Selznick for and during his lifetime; the said Myron Selznick, however, reserves the right to direct the Trustee from time to time to credit, keep and add any and all income which, pursuant to the terms hereof, may be payable to him to the principal of the corpus of the trust estate, by giving written instructions from time to time so demanding.

* * * * *

Any income accrued or undistributed at the termination of any trust or estate hereunder shall be paid and go to the beneficiary or beneficiaries entitled to the next eventual estate, in the same proportions as the principal hereof, * * *

The Tax Court noted (R. 138) that on the date of the decedent's death there were \$1,138.36 of accrued income which the trustee had not distributed to the decedent. The Tax Court then carefully considered (R. 146) all of the arguments in the case and concluded that it falls within the scope of the amendatory provisions of the joint resolution. In so concluding the court aptly said (R. 145-146):

trust income accrued to the benefit of the decedent until his power to command the payment of the income was ended by his death. He could have used this income at any time and in any manner desired merely by so requesting the trustee. The decedent enjoyed the trust income during his life to the extent that he desired. No other person had any claim upon that income until the decedent's death and it was then determined how much income, if any, the decedent had not called upon the trustee to pay over to him. The decedent retained the right to the trust income until the time of his death. The income to which he had a right which at his death he had not reduced to possession was no less "retained" by him.

In our opinion, and in the language of the Joint Resolution of 1931, the decedent made a transfer of property which he "retained for his life * * * the income therefrom, from, the property * * *." We hold, therefore, that the non-insurance assets transferred to the decedent prior to June 7, 1932, to a trust created for him on January 29, 1932, are includible in his estate under section 811(c) of the Code.

We submit that the Tax Court's decision is correct. Here the decedent retained the income in every practical and realistic sense, and whatever may be the effect of the "slight verbal difference" between the joint resolution and the 1932 amendment, they do not affect the taxpayers here and this case falls within the letter and the spirit of the joint resolution.

The taxpayers refer (Br. 10-11) to the provisions of the trust that we have quoted above, and reiterate their argument, rejected by the Tax Court, that because there was some \$1,100 of income accrued at the date of the decedent's death and this went to the succeeding generation, it necessarily follows that he did not retain

therein pointed out, the trust instrument states words that the income shall be paid to the decedent and during his lifetime" (R. 138), and he had the command over all of the trust income until he died. That is enough to support the tax.

Taxpayers refer (Br. 12-14) to the Committee report on the 1932 amendment (H. Rep. No. 708, 72d Cong., 1st Sess., pp. 46-47 (1939-1 Cum. Bull. (Part 2) 491); S. Rep. No. 665, 72d Cong., 1st Sess., pp. 493-1 Cum. Bull. (Part 2) 496, 532)), which is in part as follows:

The purpose of this amendment to section 302(c) of the revenue act of 1926 is to clarify in certain respects the amendments made to that section by joint resolution of March 3, 1931, which were intended to render taxable a transfer under which the decedent reserved the income for his life. The joint resolution was designed to avoid the effect of decisions of the Supreme Court holding such a transfer not taxable if irrevocable and not made in contemplation of death. Certain new matter has been added, which is without retroactive effect. The changes are:

1) The insertion of the words "or for any period not ascertainable without reference to his death," is to reach, for example, a transfer where the decedent reserved to himself semiannual payments of the income of a trust which he had established, with the provision that no part of the trust income between the last semiannual payment to him and his death should be paid to him or his estate, or where he reserves the income, not necessarily for the remainder of his life, but for a period in the

-
Incidentally, it should be noted (R. 63, 128-129) that under

necessary element.

(2) The insertion of the words "or for period which does not in fact end before his death which is to reach, for example, a transferor decedent, 70 years old, reserves the income for an extended term of years and dies during that term or where he is to have the income from and a transferee dies before the death of another person until his own death or such other person predeceases him. This is a clarifying change and does not represent new matter.

(3) The insertion of the words "the right to the income" in place of the words "the income" is designed to reach a case where decedent reserved the right to the income, though he did not actually receive it. This is also a clarifying change.

Taxpayers say that these reports illustrate a situation of fact not covered by the joint resolution, but the 1932 amendment was intended to cure. But assuming that to be so, it does not help the taxpayers here. Taxpayers rely upon the example in paragraph (c) with respect to reservation of semiannual payments of income, but with the provision that no part of the income between the last semiannual payment to the transferee and his death should be paid to him or his estate. Taxpayers submit that such reliance is misplaced. Even assuming that a situation of that kind would not be covered by the joint resolution, still it is plainly distinguishable from the instant situation because here the grantor retained control of all the income until he died.

The taxpayers also rely (Br. 13-14) upon Regulations applicable Regulations (Treasury Regulations Section 81.18, as amended (Appendix, *infra*)) which contain a similar reference with respect to a reservation of quarterly payments of trust income where no part of the income between the last quarterly payment and the

ains to add a word with respect to the insur-
rets which we think are also includible under

and that aspect of the case will be discussed in this section of this brief. It is true that the dividends on unmatured life insurance policies are not given sufficient significance to merit treating them as income for purposes of taxation; they are rather treated as a return of premiums paid. See I Paul, Federal Estate and Gift Taxation (1942), Sec. 10.21, p. 543. In view of the power of the instant decedent, which will be more fully discussed hereafter with respect to the divisions (d) and (g) of Section 811 of the Regulations, to surrender the policies for cash and to control the disposition of the proceeds so that he could in effect retain the income from such investments (Regulations 128, 150-151), we think that it would not be so far to hold that the insurance assets, as well as the other insurance assets, are includible under Section 811. The Commissioner took that position in the Tax Court and indeed the taxpayers appear to recognize that the insurance is involved under subdivision (d). The regulations are in harmony with that view. See Treasury Regulations 105, Section 81.25. See I Paul, Federal Estate and Gift Taxation (1942), Section 10.39, pp. 374-376.

In view of the foregoing we submit that the insurance property here involved should be included in the decedent's estate under Section 811(c); and if this Court agrees with us as to this it will be unnecessary for it to consider the further aspects of the case which will be considered in the following sections of this brief.

II

Subdivision (d) Also Applies

As stated above, in the Tax Court proceedings

but in view of its disposition of the case the court did not find it necessary to pass on the point.

)
the Commissioner is of course free to rely upon
ion (d) here (*Helvering v. Gowran*, 302 U. S.
247), and indeed the taxpayers so concede (Br.
will outline briefly our views with regard thereto.
n 811(d)(2) of the Code provides for inclusion
erty donatively transferred by the decedent
ne enjoyment was subject at the date of his
any change through the exercise of a power,
y the decedent alone or in conjunction with any
to alter, amend, or revoke.

stant trust contains the following provisions
28):

otwithstanding the fact that this Declaration
Trust is irrevocable, the Trustor, for himself
on behalf of the beneficiaries, reserves the right
etition any court of competent jurisdiction at
time and from time to time to amend and/or
true the same; provided, however, that no
ndment shall change the provisions of this trust
ch shall have the effect or which is intended to
hall cause the same to be construed to be or
nd it to be a revocable trust rather than an ir-
ceable one.

he Trustor reserves the absolute right to cancel
ause to be cancelled, and revoke or cause to be
ked, any of the insurance policies herein re-
ed to, or which may hereafter be added to this
st, provided that he first obtain the written con-
of any two of the following, to-wit: The Trus-
David O. Selznick and Loyd Wright; provided
her, that upon any cancellation any cash sur-
er values received on any such policies shall

graph above, although the second paragraph particularly with insurance policies, should borne in mind in connection with (d).

We submit that under the provisions of the t decedent had a power to alter or amend which cient to justify taxation under subdivision (d).

It is settled that the statute applies to a ca the grantor of a trust reserved the power to shares of beneficial interest therein, even th could not direct payment to himself (*Commis Estate of Holmes*, 326 U. S. 480; *Porter v. sioner*, 288 U. S. 436; *Commissioner v. Newbold's Estate*, 158 F. 2d 694 (C. A. 2d); *Mollenberg's Commissioner*, 173 F. 2d 698 (C. A. 2d); *Maloney*, 121 F. 2d 257 (C. A. 3d), certiorari 314 U.S. 636; *Thorp's Estate v. Commissioner* 2d 966 (C. A. 3d), certiorari denied, 333 U. S. *re Tyler's Estate*, 109 F. 2d 421 (C. A. 3d); *Gug v. Helvering*, 117 F. 2d 469 (C. A. 2d), certiorari 314 U. S. 621; I Paul, Federal Estate and Gift Tax (1942) and 1946 Supplement, Section 7.09) makes no difference whether the power was exercised by the grantor individually or as trustee. *sioner v. Newbold's Estate*, *supra*; *Jennings v. sioner*, 161 F. 2d 74 (C. A. 2d); *Estate of Nettleton v. sioner*, 4 T. C. 987.

See also *Commonwealth Trust Co. of Pitts Driscoll*, 50 F. Supp. 949 (Pa.), affirmed, 137 F. 2d 100 (C. A. 3d), certiorari denied, 321 U. S. 764.

Hence it is clear that (d) applies to a case w grantor reserved the power to change the scheme of enjoyment of the trust property in a substantial

We submit that this is such a case. Here th

nt should make it revocable. It seems clear power would have justified any amendments by the settlor short of actually revoking the trust agreement, Trusts (1935), Section 37) and therefore property is taxable under Section 811(d).

, the statute applies even where the power to only exercisable in conjunction with persons adverse interests (*Helvering v. City Bank Co.*, 185; Treasury Regulations 105, Section 81.20 ix, *infra*)), and such a power would appear less significance than the one in the instant where the decedent could represent both himself and beneficiaries.

taxpayers contend (Br. 19-23) that the power on amounted to no more than what the law imply in its absence and therefore is not enough for taxation. But we think otherwise; and we understand that the law would imply any such power retained by the decedent here. This power not only to procedure but also to substance, and the insistence to the contrary loses sight of the meaning and scope of the language by which the power was reserved. As noted above, here the decedent was authorized to represent both himself and all of the beneficiaries before any court of competent jurisdiction at any time in petitioning for an amendment to the trust. If he had not reserved this power, he could not represent other beneficiaries having adverse interests. *Schram v. Poole*, 97 F. 2d 566 (C. A. 9th); *Estate of Los Angeles v. Winans*, 13 Cal. App. 234; I. R. C. 203, Trust Administration and Taxation (1945), pp. 550-558, pp. 608-627.

Arguments of taxpayers are plainly unsound and

in conjunction with all the other beneficiaries of the trust and of course this added nothing to what would have conferred in the absence of the special reservation. Such a situation is recognized by the applicable Regulations (Treasury Regulations 103.81-20) to be nontaxable. And in that connection the regulation provides:

The provisions of this section do not apply if the power may be exercised only with the consent of all parties having an interest, direct or contingent, in the transferred property, if the power adds nothing to the rights of the transferee as conferred by the applicable local law.

Here we are concerned with a different sort of trust which in effect gave the settlor control over the assets of the beneficiaries.

The taxpayers say (Br. 24-25) that subdivision (b) has to do with persons, not courts, and that the power is without the scope of the statute because it could only be exercised by court petition. But this argument is plainly unsound. It is clear that the result does not depend upon the capacity in which the trust is held the power and as we have pointed out the power reserved by the grantor as trustee is within the scope of the statute. And of course a power of appointment is always subject to the control of a court of equity. In this connection see *Stix v. Commissioner*, 351 U.S. 562 (C. A. 2d), where the court said (p. 563): "The language, however strong, will entirely remove the power held in trust from the reach of a court of equity."

Taxpayers cite cases (Br. 26-27) such as *Commissioner v. Irving Trust Co.*, 147 F. 2d 946 (C. A. 2d) but they have little, if any bearing on the issue.

case; but whatever may be thought as to the effect of the decision in the *Irving Trust Co.* case, it does not hold or indicate that taxability in a case such as we have here can be avoided merely by saying that the exercise of the power in question is subject to scrutiny by a court of equity. The majority says (Br. 27) that in the instant case there is no internal standard with respect to exercise of the power. Assuming that to be so, it would not weaken our position here and it does not at all detract from the exercise of the power. Here the grantor reserved a broad comprehensive power to alter or amend and that is sufficient to support taxation under subdivision (d) despite the fact that the exercise of the power would require application to a court of competent jurisdiction. In view of the foregoing we submit that all of the assets here involved (both non-insurance and insurance assets) is includible under Section 811(d) as well as under 811(g); and if this Court agrees with us as to either subdivision, it will be unnecessary for it to consider 811(g) which relates solely to insurance and is not discussed in the next section of this brief.

III

Consequently, the Insurance Proceeds Are Includible under Section 811(g)

We submit that whatever may be thought as to the effect of our position with respect to Section 811(d), still, the insurance assets are includible under Section 811(g) of the Code, as amended by Section 104 of the Revenue Act of 1942 and the Tax Court has correctly so held. (R. 146-151.)

Section 811(g), as so amended, relates to amounts received by a beneficiary under a policy upon the life

receivable by all other beneficiaries where the policy was purchased with premiums paid directly or indirectly by the decedent or with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person. The law as so amended is applicable to estates of decedents dying after October 3, 1942; but in determining the proportion of premiums paid by the decedent the amount so paid before January 10, 1941, shall be excluded if after such date the decedent possessed an incident of ownership in the policy.²

The instant decedent died in 1944 and so the foregoing provisions are applicable. Under the terms of the statute, outlined above, the insurance proceeds involved are includible if the decedent possessed at his death, or at any time after January 10, 1941, any of the incidents of ownership, exercisable either alone or in conjunction with any other person. We understand that there is any dispute as to this.

The point in dispute is whether the decedent possessed such incidents of ownership. We submit that he did at all times after January 10, 1941, until he died.

The second paragraph of Article XI of the will instrument (which we referred to above in connection with (d)) contains the following language (Exhibit 149):

The Trustor reserves the absolute right to cause the trust or cause to be cancelled, and revoke or cause to be revoked, any of the insurance policies hereinafter

² The law was further amended by Section 502(a) of the

ed to, or which may hereafter be added to this trust, provided that he first obtain the written consent of any two of the following, to wit: The trustee, David O. Selznick and Loyd Wright; provided further, that upon any cancellation any surrender values received on any such policies, shall remain in and/or be added to the corpus of this trust.

Regulations 105, Section 81.27, as amended (see *infra*), undertakes to define the term "incidental ownership," and provides that it is not confined to ownership in the technical legal sense. Section 81.27 provides as follows:

Incidents of ownership in the policy include, for example, the right of the insured or his estate to receive economic benefits, the power to change the beneficiary, to surrender or cancel the policy, to borrow on it, to revoke an assignment, to pledge it for a loan, or to obtain from the insurer a loan against the surrender value of the policy, etc. The insured exercises an incident of ownership if his death is necessary to terminate his interest in the insurance, as, for example, if the proceeds would become payable to his estate, or payable as he might direct, should the beneficiary predecease him.

Paul, *Federal Estate and Gift Taxation* (1946) Section 10.37, pp. 368-372; H. Rep. No. 2333, 76th Cong., 2d Sess., p. 163 (1942-2 Cum. Bull. 372, 491); S. Rep. No. 1631, 77th Cong., 2d Sess., p. 235 (1942-2 Cum. Bull. 504, 677).

Under the provisions of the trust, quoted above, the insured had the right to cancel and revoke any of the policies with the consent of two other persons, provided, that any cash surrender values received on

The insurance policies were made payable to the trust and the decedent reserved in the trust the power to cancel the insurance policies if he obtained the written consent of any two of the following: The Trustee, David O. Selznick, and Wright. But the decedent reserved the right to revoke the appointment of the last two persons above and to "substitute other persons." It is true, as the petitioners contend, that the proceeds of the cancelled policies would not immediately accrue to the decedent. But those proceeds would be invested by the trustee and the income therefrom would go to decedent for his life under the trust agreement. Further, the decedent reserved, in the trust, the right to direct the trustee as to the investment of the trust corpus, and of which the canceled policies would become a part. The investment directed by the decedent would be "approved and permissible by law for the investment of trust funds under the laws of the State of California."

It is apparent that the decedent could have directed the policies and the proceeds representing surrender value would become a part of the trust corpus. Although the proceeds of the cancelled policies would not inure to the decedent, the income therefrom (since he reserved the right to the income for life) would go to the decedent. Such investment of the proceeds as the decedent chose to direct. The right to receive the income from such property is an "incident of ownership" within the meaning of the statute.

In our opinion, the proceeds of the insurance policies allocable to premiums paid prior to January 10, 1941, are includible in the decedent's estate under the provisions of section 812 of the Internal Revenue Code, and we so hold.

could amend and thus change the beneficiaries of the trust and in the circumstances this power was limited to an incident of ownership. *Chase Nat. United States*, 278 U. S. 327; *Helvering v. Fitzgerald*, 33 F. 2d 215 (C. A. 2d); *Estate of Welliver v. Commissioner*, 8 T. C. 165.

When all is considered, we think it plain that the facts here had incidents of ownership sufficient to justify the holding under (g), and the authorities amply support

Chase Nat. Bank v. United States, *supra*; *Helvering v. Smyth*, 87 F. Supp. 983 (N.D. Cal.), affirmed, 220 F. 2d 100 (C. A. 9th); *Commissioner v. Treganowan*, 220 F. 2d 288 (C. A. 2d), certiorari denied, *sub nom. Treganowan v. Commissioner*, 340 U. S. 853; *Hock v. Commissioner*, 152 F. 2d 574 (C. A. 8th); *Liebmann v. Commissioner*, 148 F. 2d 247 (C. A. 1st); *Schongalla v. Commissioner*, 49 F. 2d 687 (C. A. 2d), certiorari denied, 310 U. S. 736; *Seward's Estate v. Commissioner*, 164 F. 2d 100 (C. A. 4th).

In light of the foregoing considerations we submit that the Tax Court did not err in holding the insurance contracts voidable under Section 811(g).

The taxpayers say (Br. 33) that by the assignments to the trust the decedent completely divested himself of ownership and rights in the contracts, retaining no incident of ownership. But that contention is out of harmony with the reservations in the trust instrument set out above, which the decedent unquestionably retained. Indeed, the taxpayers admit (Br. 34) that the decedent retained under the trust the right with the consent of two other persons to cancel the policies and to receive the event the surrender values were to remain in the trust corpus. However, they contend (Br. 34)

we submit that such contention is plainly
The authorities cited by taxpayers are not at
with our position here and none of them hold
intimates that rights such as retained by this
do not constitute an incident of ownership
rights were explicitly reserved in the trust in
they are clearly enough to support taxation
(g) and the Tax Court properly so held.

In the light of these considerations we su
all of the assets here involved are includib
gross estate under Section 811(c) or (d)
the insurance is also taxable under (g).
Court's decision is correct and can be supp
only by the Tax Court's reasoning but upo
grounds we have set out in this brief.

CONCLUSION

The decision of the Tax Court should be
Respectfully submitted.

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OCTOBER, 1951.

. 811. GROSS ESTATE

the value of the gross estate of the decedent
be determined by including the value at the
of his death of all property, real or personal,
ble or intangible, wherever situated, except
property situated outside of the United
s—

* * * * *

[as amended by Sec. 7(a) of the Technical
ges Act of 1949 (Act of October 25, 1949),
, 63 Stat. 891.] *Transfers in Contemplation
Taking Effect at, Death.*—

1) *General Rule.*—To the extent of any inter-
therein of which the decedent has at any time
le a transfer (except in case of a bona fide
for an adequate and full consideration in
ney or money's worth), by trust or other-
e—

* * * * *

(B) under which he has retained for his
fe or for any period not ascertainable with-
ut reference to his death or for any period
hich does not in fact end before his death
i) the possession or enjoyment of, or the
right to the income from, the property, or (ii)
ne right, either alone or in conjunction with
ny person, to designate the persons who shall
ossess or enjoy the property or the income
herefrom; * * *

* * * * *

Revocable Transfers—

* * * * *

2) *Transfers on or Prior to June 22, 1936.*

thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, where the decedent relinquished any such power in contemplation of his death, except in the case of a bona fide sale for an adequate and full consideration in money or money's worth.

*

*

*

*

(g) [as amended by Section 404(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798.]
of Life Insurance.—

*

*

*

*

(2) *Receivable by Other Beneficiaries.*—The extent of the amount receivable by other beneficiaries as insurance under a policy on the life of the decedent (A) purchased for himself, or for himself and another, or for others, or for premiums, or other consideration, paid directly or indirectly by the decedent, in proportion to the amount so paid by the decedent bears the same ratio to the total premiums paid for the insurance as the amount so paid with respect to which the decedent paid for his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person. For the purposes of clause (A) of this paragraph, if the decedent transferred the policy by assignment or otherwise, a policy of insurance, the amount paid directly or indirectly by the decedent shall be reduced by an amount which bears the same ratio to the amount paid directly or indirectly by the decedent as the consideration in money or money's worth received by the decedent for the transfer bears to the value of the policy at the time of the transfer. For the purposes of clause (B) of this paragraph, the term "incident of ownership" does not include a reversionary interest.

7. TRANSFERS TAKING EFFECT AT DEATH.

* * * * *

The amendment made by subsection (a) is applicable with respect to estates of decedents dying after February 10, 1939. The provisions of section 811(c) of the Internal Revenue Code as amended by subsection (a), shall (except otherwise specifically provided in such section by the following sentence) apply to transfers made on, before, or after February 26, 1926. The provisions of section 811(c)(1)(B) of such code shall not, in the case of a decedent dying prior to January 1, 1950, apply to—

- (1) a transfer made prior to March 4, 1931; or
- (2) a transfer made after March 3, 1931, and prior to June 7, 1932, unless the property transferred would have been includible in the decedent's gross estate by reason of the amendatory language of the joint resolution of March 3, 1931 (63 Stat. 1516).

* * * * *

Act of 1942, c. 619, 56 Stat. 798:

404. PROCEEDS OF LIFE INSURANCE.

* * * * *

Decedents to Which Amendments Apply—The amendments made by subsection (a) are applicable only to estates of decedents dying on or after the date of the enactment of this Act [October 29, 1942]; but in determining the proportion of premiums or other consideration paid directly by the decedent (but not the total amounts paid) the amount so paid by the decedent on or before January 10, 1941, shall be ex-

SEC. 81.18 [as amended by T.D. 5834, 1 Rev. Bull. 6, 14.] *Transfers with Possession and Enjoyment Retained.*—(a) *General rule.* In the case of a bona fide sale for an adequate and full consideration in money or money's worth, section 811(c)(1)(B) requires the inclusion in the gross estate of the value of all property transferred by the decedent, whether in trust or otherwise, if the decedent retained or reserved the use, possession, right to the income, or other enjoyment of the transferred property (1) for his life; or (2) for any period not ascertainable without reference to his death; or (3) for such a period as to extend beyond his intention that it should extend at the expiration of the duration of his life and his death occurs within the expiration of such period. Except as otherwise provided in paragraph (b) of this section such property shall be includible without regard to the date the transfer was made, whether before or after the enactment of the Revenue Act of 1916.

A reservation for a "period not ascertainable without reference to his death" may be made by a reservation of the right to receive, in whole or in part, payments, the income of the transferred property, where none of the income between the last payment and the decedent's death was received by him or his estate. This expression includes a reservation of the right to receive income from transferred property after the death of another person who in fact survived the decedent; but in such a case the amount to be included in the gross estate under this section shall not include the value of the outstanding income of such other person. However, if such other person predeceased the decedent, the reservation may be considered to be for the decedent's life for such a period as to evidence his intention that the property should be included in his gross estate.

ent of the property will be considered as been retained by or reserved to the decedent extent that during any such period it is to lied toward the discharge of a legal obliga- the decedent, or otherwise for his pecuniary

uch retention or reservation is of a part only use, possession, income, or other enjoyment property, then only a corresponding propor- the value of the property should be included ermining the value of the gross estate.

e section 81.15.)

Estates of decedents dying before January 1,

-In the case of a decedent who died before ry 1, 1950, property shall not be included gross estate under this section unless trans-

1) after March 3, 1931, and before June 7, 2, and the retention or reservation by the edent was (A) for his life or (B) for such eriod as to evidence his intention that it uld extend at least for the duration of his and his death occurs before the expiration uch period; or

2) on or after June 7, 1932.

. 81.19 [as amended by T. D. 5834, *supra*,

Transfers with Right Retained to Desig-

Who Shall Possess or Enjoy—(a) *General*

-Except in the case of a bona fide sale for an

ate and full consideration in money or

r's worth, section 811(c)(1)(B) requires the

ion in the gross estate of the value of all prop-

ransferred by the decedent, whether in trust

erwise, if there is retained by or reserved

n (1) for his life, or (2) for any period not

ainable without reference to his death, or

or such a period as to evidence his intention

tion with any other person or persons to the person or persons who shall possess the transferred property or the income. Except as provided in (b) of this section, property is includible without regard to when the transfer was made, whether before or after the enactment of the Revenue Act of 1950.

The rights of designation described in section 811(c)(1)(B) include a reserved power to designate the person or persons who shall, during the decedent's life or during any lesser period prescribed in such section, receive the income from the transferred property or who shall, during such period, possess or enjoy non-income-producing property. Such rights of designation do not, however, include powers over the transferred property itself not affecting the enjoyment of the income during the decedent's life. (See section 81.20.)

If the retention or reservation of the right of designation pertains to a part only of the transferred property, or to a part only of the income therefrom, then only a corresponding proportion of the transferred property is includible in computing the value of the gross estate.

The right to so designate will be treated as having been retained or reserved if at the time of the transfer there was an understanding, expressed or implied, that such right would be created or conferred.

(See section 81.15.)

(b) *Estates of decedents dying before January 1, 1950.*—In the case of a decedent who died before January 1, 1950, property shall not be included in the gross estate under this section unless it was transferred—

(1) after March 3, 1931, and before January 1, 1932, and the right of designation was

expiration of such period; or

2) on or after June 7, 1932.

. 81.20. *Transfers with Power to Change the
ment.*—(a) *Transfers included.*—Subsection
f section 811 embraces a transfer by trust
erwise (if not amounting to a bona fide
or an adequate and full consideration in
y or money's worth) when at the time of
ent's death the enjoyment of the transferred
rty, or some part thereof or interest therein,
subject to any change through a power
sable either by the decedent alone, or by
n conjunction with some other person or
as, to alter, or amend, or revoke, or terminate.
section 81.15.)

In addition to subdivision (d)(1) of the Reve-
ct of 1926, by section 805 of the Revenue Act
6, of the phrase to the effect that it is not ma-
in what capacity the power was subject to
se by the decedent or by the other person or
as in conjunction with the decedent (which
e is also embodied in subsection (d)(1) of
n 811 of the Internal Revenue Code), is con-
d merely declaratory of the meaning of the
vision prior to the addition of the phrase.

The second phrase added to this subdivision of
venue Act of 1926 by amendment in 1936
mbodied in section 811(d) (1) of the Internal
ue Code), namely, "without regard to when
m what source the decedent acquired such
, " is not considered declaratory of the mean-
the subdivision prior to the amendment in
in which no one of the powers enumerated
subdivision was reserved at the time of the
g of the transfer, but one or more thereof
conferred subsequent thereto (whatever the
from which conferred) without any under-
ng expressed or implied had in connection

Revenue Act of 1936 (which is also amended by subsection (d)(1) of section 811 of the Revenue Code) consists of the addition of the words "or terminate" following the words "alter, amend, revoke." Such addition is declaratory of the meaning of the statute as prior to the amendment. A power to terminate is capable of being so exercised as to revoke the decedent the ownership of the transferred property or an interest therein, or as otherwise for his benefit or the benefit of his estate, to the extent, the equivalent of a power to "revoke" when otherwise so exercisable as to effect a termination in the enjoyment, is the equivalent of a power to "alter."

(b) *Taxability.*—The property or an interest therein transferred as described in subsection (a) shall be included in the gross estate if the transfer was within any one of the following paragraphs:

(1) If the transfer was made prior to the enactment of the Revenue Act of 1924 (4:01 P.M. eastern standard time, June 2, 1924), and the power was reserved at the time of the transfer, and was exercisable by the decedent alone or in conjunction with a person or persons having no substantial adverse interest or interests in the transferred property, or if exercisable in conjunction with a person or persons having a substantial adverse interest or interests, or if exercisable by several persons some or all of whom held a substantial adverse interest, then to the extent of any interest held by a person or persons not consenting to join in the exercise of the power and to the extent of any adverse interest which was substantial.

(2) If the transfer was made after the enactment of the Revenue Act of 1924 (4:01 P.M. eastern standard time, June 2, 1924) and before the amendment of the subdivision by the Revenue Act of 1936 became effective (June 23, 1936)

...a person or persons either alone or in conjunction with a substantial adverse interest or interests transferred property, or in conjunction with one or more of whom had and one or more of whom had not such an adverse interest.

If the transfer was made after June 22, 1936 (the date of the enactment of the Revenue Act of 1936), and the power was either reserved at the time of the transfer or later created or conferred without regard to the source from which the power was acquired, and whether exercisable by the decedent alone or in conjunction with a person or persons either having or not having a substantial adverse interest or interests in the transferred property, or in conjunction with persons one or more of whom had and one or more of whom had not such an adverse interest.

As used in this and in the next succeeding section the expression "reserved at the time of the transfer" refers to a power to which the transfer was subject when made, whether the power arose by operation of law or by the express terms of the instrument of transfer, and which continued to the date of decedent's death (see the paragraph following as to the conditions under which the power will be considered as existent at decedent's death) to be exercisable by decedent alone or by him in conjunction with some other person or persons, and includes any understanding, express or implied, had in connection with the making of the transfer that the power should later be conferred or conferred.

A power to alter, amend, revoke, or terminate shall be considered to have existed on the date of decedent's death, though the exercise of the power was subject to a precedent giving of notice, though the alteration, amendment, revocation, or termination would take effect only on the expiration of a stated period after the exercise of the power, whether or not on or before the date of

which had not arrived, or the happening of a particular event which had not occurred, at death. In determining the value of the estate in such cases the full value of the transferred subject to the power should be counted for the period required to elapse between the date of decedent's death and the date at which the alteration, amendment, revocation or termination could take effect.

(See section 81.10(i)(3).)

The provisions of this section do not apply to a transfer if the power may be exercised only with the consent of all parties having an interest in the property or contingent, in the transferred property, or if the power adds nothing to the rights of the transferee as conferred by the applicable local law.

SEC. 81.27 [as amended by T. D. 5239, Bull. 1081, 1092.] *Insurance Receivable by Beneficiaries.*—(a) *In case of decedent dying after October 21, 1942.*—The regulations prescribed under this subsection (except as otherwise provided herein or in subsection (b) of this section) are applicable only in the case of decedents who died after October 21, 1942, the date of the enactment of the Revenue Act of 1942. In such cases, the value of the aggregate proceeds of all insurance payable at the life of the decedent not receivable by the decedent for the benefit of his estate must also be included in the gross estate, as follows:

(1) Such insurance (not includible under this subsection) purchased with or for consideration, paid directly or indirectly by the decedent, in the proportion that the amount so paid by the decedent bears to the total premiums paid for the insurance.

(2) Such insurance with respect to which the decedent possessed at his death any interest or incidents of ownership, exercisable either

the purposes of (1) of this subsection, in-
ning the proportion of the premiums or
consideration paid directly or indirectly by
decendent (but not the total premiums paid)
ount so paid by the decedent on or before
y 10, 1941, shall be excluded if at no time
uch date the decedent possessed an incident
ership in the policy. For the purpose of
ceeding sentence a reversionary interest is
dent of ownership. For a description of
d other incidents of ownership, see the fol-
paragraph and subsection (b) of this sec-

the purposes of this section, the term "inci-
f ownership" is not confined to ownership
technical legal sense. For example, a power
ge the beneficiary reserved to a corporation
ch the decedent is sole stockholder is an
t of ownership in the decedent. For the
es of this subsection, the term "incidents
ership" includes the incidents of ownership
ed in subsection (b) (except as provided in
rt sentence) and, in addition, includes inci-
of ownership possessed by the decedent as
er of the community where the insurance
is properly held as community property by
cedent and spouse. Section 811(a)(2), as
by the Revenue Act of 1942, expressly pro-
hat for the purposes of section 811(g)(2)
see (2) of this subsection), but not for the
es of section 811(g)(2)(A) (see (1) of this
ion), the term "incidents of ownership"
ot include a reversionary interest. However,
gnment of an insurance policy by a decedent
sing other incidents of ownership therein un-
ich he reserves a reversionary interest may
in the proceeds of the policy being includible
gross estate under section 811(c). See sec-
..25.

In case of decedent's death, the following

for example, the right of the insured or to its economic benefits, the power to c beneficiary, to surrender or cancel the assign it, to revoke an assignment, to pl a loan, or to obtain from the insurer a lo the surrender value of the policy, etc. insured possesses an incident of owners death is necessary to terminate his inter insurance, as, for example, if the proce become payable to his estate, or payable a direct, should the beneficiary predecease

*

*

*

*

1937-1938.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

OF MYRON SELZNICK, Deceased, BANK OF AMER-
-ICAN NATIONAL TRUST AND SAVINGS ASSOCIATION, DAVID
SELZNICK and CHARLES H. SACHS, Executors,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

REPLY BRIEF FOR PETITIONERS.

WALTER L. NOSSAMAN,
JOSEPH D. BRADY,

433 South Spring Street,
Los Angeles 13, California,

Attorneys for Petitioners.

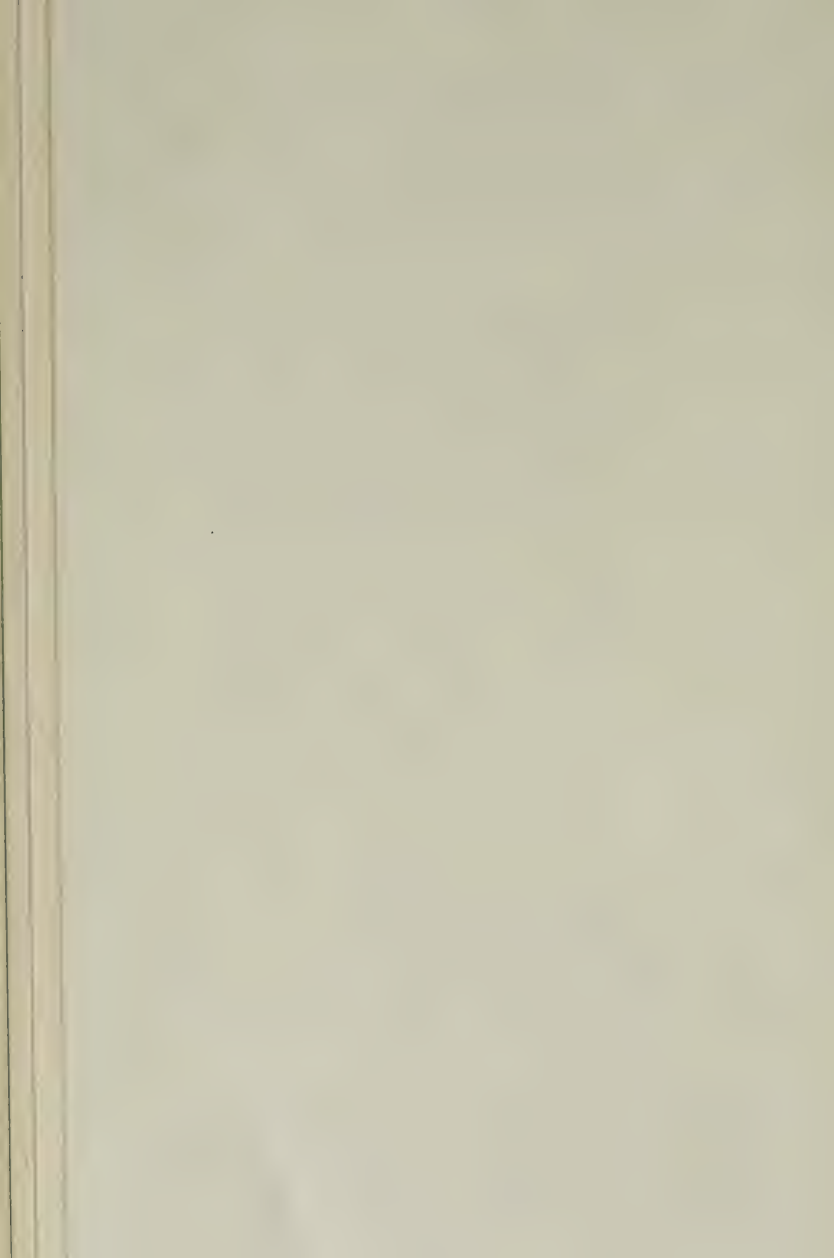


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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

OF MYRON SELZNICK, Deceased, BANK OF AMER-
TIONAL TRUST AND SAVINGS ASSOCIATION, DAVID
SELZNICK and CHARLES H. SACHS, Executors,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

REPLY BRIEF FOR PETITIONERS.

Respondent contends:

That as to non-insurance assets the case is within
§ 11(c), I. R. C., because of income allegedly re-
ceived for his life or any period not ending before his
Joint Resolution of March 3, 1931, quoted Pet.
App. p. 1).

That as to insurance assets the same rule applies
under the provision for cancellation of the policies
regarding the cash surrender values to corpus [Ex. 1-A,
Tr. 62].

4. That as to the insurance assets the case Section 811(g) because of "incidents of ownership allegedly retained.

To reply point by point to respondent's contentions require an unnecessary and unwelcome repetition of argument in chief. We shall limit to salient points the discussion which follows:

Points 1 and 2. Section 811(c). It may be noted that the parties to *Hassett v. Welch* agreed and the Court (p. 307 of 303 U. S.), that the 1932 amendment (Br., App. p. 1) "reenacted the substance of the 1931 Resolution with but slight verbal differences." The Court was not called on in that case to determine the scope or effect of those "slight verbal differences." The question was whether the 1931 and 1932 legislation were retroactive. The result and the reasoning by which the Court reached would have been the same had the 1932 amendment not been enacted. Indeed (p. 313 of 303 U. S.) the Court notes the Treasury's inconsistency in treating the 1932 amendment as retroactive, while treating the 1931 Joint Resolution as non-retroactive.

We suggest that in the present case the Government is exhibiting a little of the same reluctance to treat the 1932 amendment as effecting a change in the law that it exhibited some fourteen years ago in *Welch*. That this amendment covered new ground and it closed what both the Treasury and Congress considered was a "loophole" in the law, is shown by the closing of our opening brief (pp. 12-13) and the Appendix.

3, page 7 of the Appendix to our opening brief
ed to the pre-March 8, 1951 version of Reg. 105,
1.18.¹ It will be a convenience to the Court to
relevant part of the pertinent regulation as it
e time of Selznick's death in 1944.

tion 81.18. Transfers with possession or en-
ent retained. Except in the case of a bona fide
for an adequate and full consideration in money
oney's worth, the gross estate embraces (section
c)) all property transferred by the decedent,
her in trust or otherwise, if he retained or re-
ed the use, possession, right to the income, or other
yment of the transferred property, and if the
fer was made—

(1) At any time after 10:30 p. m., eastern
standard time, March 3, 1931, and such reten-
tion or reservation is for his life, or for such
a period as to evidence his intention that it
should extend at least for the duration of his
life and his death occurs before the expiration
of such period; or

(2) At any time after 5 p. m., eastern stan-
dard time, June 6, 1952, and such retention or
reservation is for any period mentioned in (1)
or for any period not ascertainable without refer-
ence to his death.

g is subsection (b) of the present Section 81.18, quoted
of the Appendix to our opening brief:

ates of decedents dying before January 1, 1950. In
a decedent who died before January 1, 1950, property
e included in the gross estate under this section unless

A reservation for a 'period not ascertainable without reference to his death' may be illustrated by a resolution of the right to receive, in quarterly payments, the income of the transferred property, none of the income between the last quarterly payment and decedent's death was to be received by him or his estate; or by a reservation of a life interest following a precedent estate for life or a term of years." (See T. D. 4868, 1938-2, C. B. 111, amended by T. D. 5741, 1949-2, C. B. 111, reproduced in C. C. H. Federal Estate & Gift Tax Reporter, ¶1460.01.)

Exactly the same differentiation between pre-June 6, 1932 transfers was made in the pre-1951 version of Section 81.19, in effect at the time of Selznick's death, relating to transfers with right to designate who shall possess or enjoy. (C. B. 111, as *supra*; C. C. H. Federal Estate & Gift Tax Reporter, ¶1470.01.)

Point 3. Section 811(d). Respondent says (21):

"* * * Here the settlor had the power to prevent himself and the beneficiaries in petitioning a court of competent jurisdiction at any time to revoke the trust, provided, however, that no amendment should make it revocable. It seems clear that such power would have justified any amendment made by the settlor short of actually revoking the trust (see Restatement, Trusts (1935), Section 331); therefore the property is taxable under Section 811(d)."

ated on page 21) that "the settlor had the represent himself and the beneficiaries in petitioning court of competent jurisdiction at any time the trust" is not clear to us. The trust [Trust] gives the trustor the right "to petition any competent jurisdiction * * * to amend the trust." This does not give, it does not purport to give any right to proceed *ex parte*. The "petition," if assumed, would have to follow regular and proper procedure. That procedure would require that the beneficiaries be made parties.

California law is clear. In *Mitau v. Roddan*, 149 Cal. Pac. 145 (1906), a trust case, the court says

* * It is the general rule in equity, confirmed in force by the provisions of the Code of Civil Procedure (sec. 389), that all who are interested in the subject-matter of a litigation should be made parties thereto, in order that complete justice may be done, and that there may be a final determination of the rights of all parties interested in the subject-matter of the controversy."

See v. Security Trust & Savings Bank, 208 Cal. Pac. 1026 (1929). The court says (p. 467):

* * It is manifest that in a controversy by the settlor with the other settlor and/or beneficiaries, the trustee is in no sense the representative of either. A trustee is given by statute the right to execute in execution of the powers conferred without regard to the beneficiaries as plaintiffs, but this applies

The same rule applies where the purpose of "amendment" is "to amend and/or construe."

Other California cases on the necessity of joining beneficiaries in suits where the relations *inter se* of settlor, trustee or beneficiaries are involved are *Dowd*, 207 Cal. 290, 277 Pac. 1047 (1929); *Bank of California*, 19 Cal. App. 2d 579, 65 P.2d 1047 (1937); *De Olazabal v. Mix*, 24 Cal. App. 2d 787 (1937).

In *Carey v. Brown*, 92 U. S. 171, 23 L. Ed. 201 (1875), the court says (p. 172):

"The general rule is, that in suits respecting real property, brought either by or against the trustee of the *cestuis que* trust as well as the trustees and necessary parties. Story, Eq. Pl., sec. 207."

The court then enumerates certain exceptions to the rule which are not material here.

Selznick, in reserving the power to petition for amendment "to amend and/or construe" the trust, did not write a new code of procedure for himself, or require, as to himself, long settled procedural requirements. He would have been pulling at his bootstraps if he had attempted to do so.

Point 4. Section 811(g). Insurance assets. The court intended (Resp. Br. pp. 23-28) that the change in ownership of assets which would result from surrender of the policy, and this in turn resulting in Selznick's receiving the proceeds therefrom—is an "incident of ownership." N

ask the Court's indulgence in breaking up this into its component parts.

Right to economic benefits. Selznick had no such except a right to income (if the policies were ordered), which right, if we are correct in our contention on this appeal, is insufficient to the proceeds into the taxable estate.

must be remembered that under the statute, the cant thing as to insurance purchased with pre-paid on or prior to January 10, 1941 [an item 48,805.10 here, and the only insurance item in e, see Tr. p. 41] is the retention of an incident nership. To surrender for cash (the insured ing the cash), to pledge for loans, to change eneficiaries, are plain cases. They are rights enant to and inseparable from ownership.

es retention of income (assuming it was retained h manner as to impose tax liability at all, which not admit) fall into the same category? Obvi- rights to income can and do exist in innum- cases quite irrespective of "ownership" on the f the person receiving the income. An income ciary of a trust has a right to income, but does ecessarily or even ordinarily have any "owner- except that right.

tion 811(g) plainly contemplates an "owner- which attaches to the policy or its proceeds. etention of a right to income, even if the Court that right to have been effectively retained as

January 10, 1941 (Section 503(a), Revenue Ruling 1950, Op. Br., App. pp. 5-6).

b. *Power to change the beneficiary.* See Reg. 20.2039-2, which provides that there is no such right.

c. *To surrender or cancel the policy.* The insured could surrender or cancel (the fact he had to obtain the consent of two other persons is not important). *But the surrender or cancellation did not result in the proceeds to return to him or give him any other benefits which he did not have before.* The insured irrevocably disposed of under the trust. The regulation is not to be construed in such a way as to lead to doubtful or incongruous results. It is not the case in cases where the insured, through surrender or cancellation in specie, immediate benefits as to which a promise he had only a promise. That is not the situation.

d. *To assign the policy.*

e. *To revoke an assignment.*

f. *To pledge the policy.*

g. *To obtain a loan against surrender*

Selznick had none of these rights.

The concluding sentence of the regulation is inapplicable.

We shall not review the cases cited by the Service (Br. p. 27) on this point. In all of them the insured disposed of the elements of reversion (then important) or of the proceeds of the policies in a manner and degree

new ground, and to predicate the essentials of
upon grounds which at best are shaky and
s, and which seem to us non-existent.

ference, we submit that the decision of the
t should be reversed in its entirety; and if this
denied, that the minimum relief to which peti-
re entitled is the exclusion from taxability of
f the insurance purchased with premiums paid on
January 10, 1941.

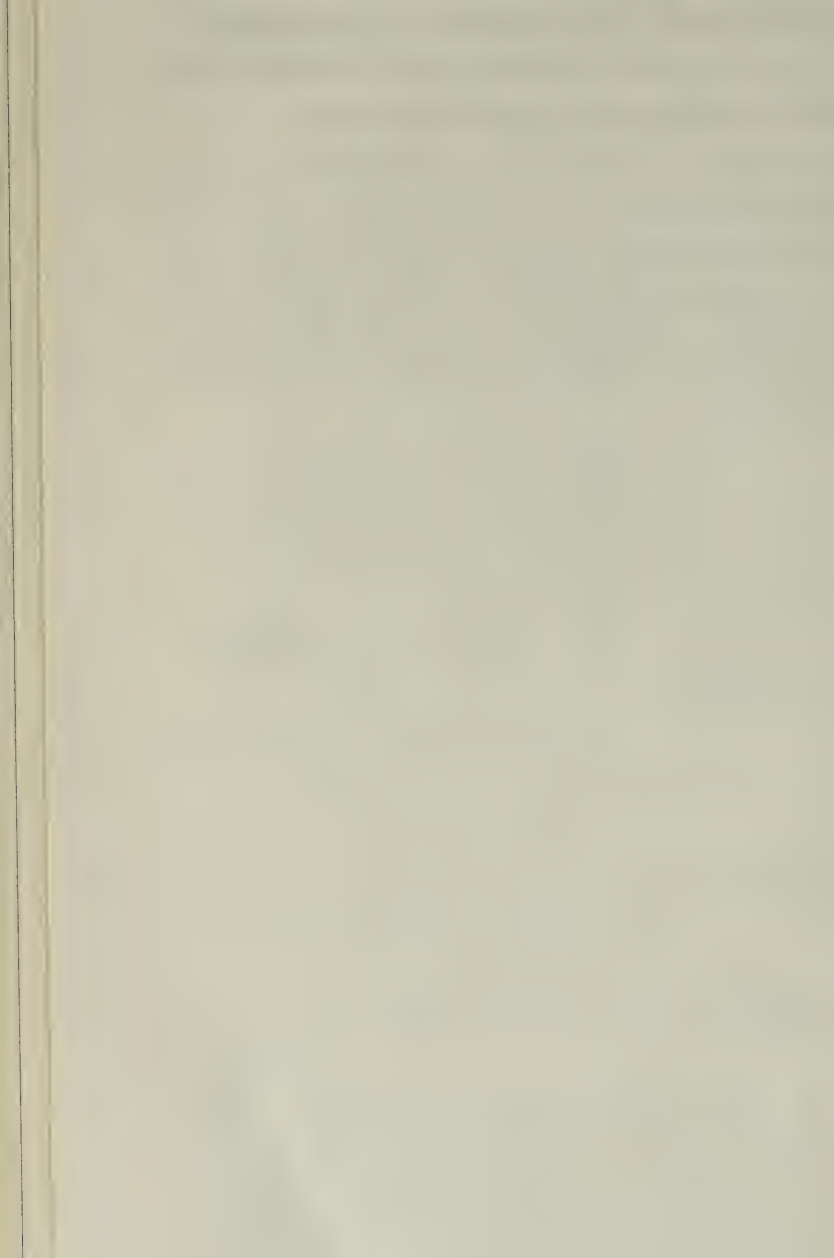
Respectfully submitted,

WALTER L. NOSSAMAN,

JOSEPH D. BRADY,

Attorneys for Petitioners.

· 22, 1951.



NOV 12 1900

United States
Court of Appeals
For the Ninth Circuit.

WING FOO,

Appellant,

vs.

ARD McGRATH, Attorney General of the
ed States,

Appellee.

Transcript of Record

deal from the United States District Court,
Northern District of California,
Southern Division.



United States
Court of Appeals
For the Ninth Circuit.

WING FOO,

Appellant,

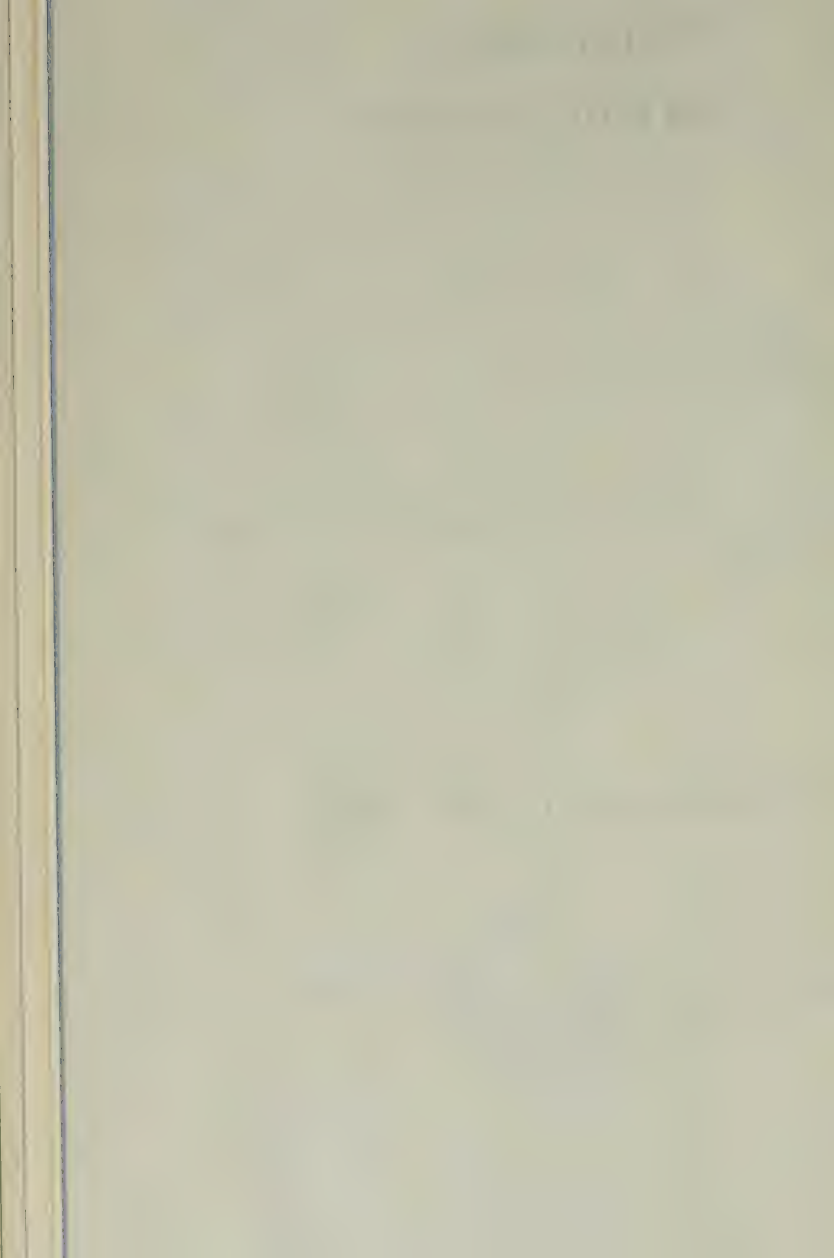
vs.

WARD McGRATH, Attorney General of the
United States,

Appellee.

Transcript of Record

**Appeal from the United States District Court,
Northern District of California,
Southern Division.**



Note: When deemed likely to be of an important nature, doubtful matters appearing in the original certified record literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein. When possible, an omission from the text is indicated by *italic* the two words between which the omission seems

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Witnesses, Plaintiff's:

Wong Wing Foo

—direct

—cross

Wong Yem

—direct

—cross

AND ADDRESSES OF ATTORNEYS

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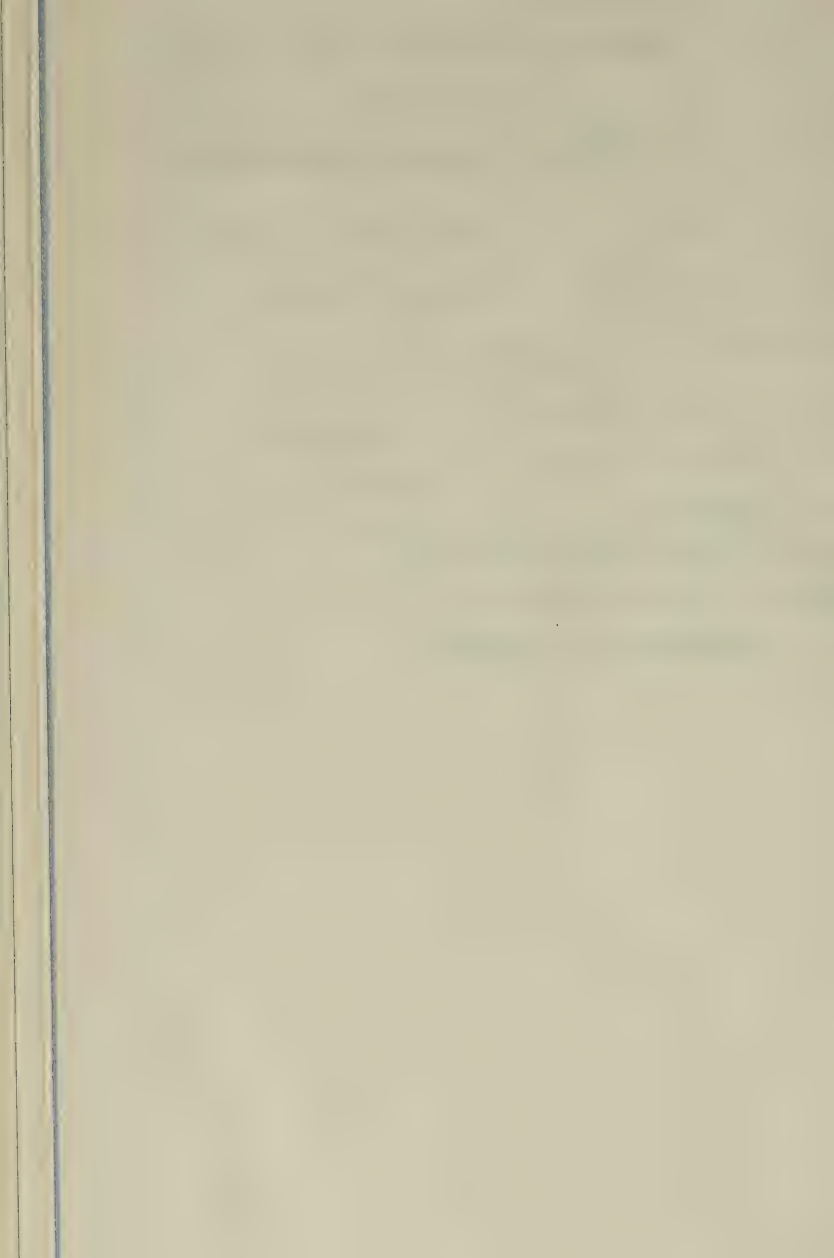
United States Attorney,

R. BONSALL,

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San Francisco, California,

Attorneys for Appellee.



Southern Division of the United States
District Court, in and for the Northern Dis-
trict of California, Second Division

No. 29118-R

WING FOO,

Plaintiff,

vs.

HAROLD McGRATH, Attorney General of the
United States of America,

Defendant.

COMPLAINT FOR DECLARATORY
JUDGMENT TO ESTABLISH CITIZENSHIP

Plaintiff, Wong Wing Foo, and his attorneys,
Sing, complain of the defendant as follows:

I.

Plaintiff is a resident of the County of San
Joaquin, City of Lodi, State of California, wherein
he maintains his lawful domicile with his father,
Wong Sing.

II.

The defendant is the duly appointed and
authorized Attorney General of the United States,
and such is the head of the Immigration and
Naturalization Department of the United States,
acting herein in his official capacity as such.

III.

That the jurisdiction of this Court is because plaintiff has a cause of action against defendant pursuant to the provisions of Section 903 of the Nationality Act of 1940, as amended pursuant to Title 8, Section 903, United States Code Annotated.

IV.

That plaintiff is a citizen of the United States.

V.

That plaintiff was born on June 22, 1900, at Cheung Sing Village, Toyshan District, Kwangtung Province, China; that plaintiff's lawful blood name is Wong Yem, and that his lawful blood name is Lim Shee, lawful wife of the said Wong Yem; that the said Wong Yem is a citizen of the United States and was a citizen of the United States at the time of plaintiff's birth in China; that the said Wong Yem had resided in the United States at the time of plaintiff's birth; that at birth, plaintiff was a citizen of the United States by reason of the fact that the United States then in full force and effect, to wit, Section 1993, United States Revised Statutes, as amended (Act of February 10, 1880), provided that the said Lim Shee is a native and citizen of the Republic of China.

VI.

That the plaintiff departed from China and came to the United States to join his said father and the

d arrived at the port of San Francisco,
, on November 26, 1948, via the Philip-
Lines, seeking admission to the United
a citizen thereof.

VII.

e plaintiff was detained by the Immigra-
Naturalization Service, Department of
said port, and restrained of his liberty
e United States; that a Board of Special
omposed of officers and employees of the
on and Naturalization Service of the
nt of Justice denied that plaintiff is the
od son of the said Wong Yem and is a
the United States, and ordered plaintiff's
from the United States to China as an
a citizen of China.

VIII.

e plaintiff took an appeal from said de-
the Commissioner of Immigration and
tion Service and to the Board of Immi-
ppeals, Department of Justice, who and
under the direction of, and are solely
e to, the defendant, as Attorney General
ited States; said Commissioner and said
Immigration Appeals affirmed the said
decision of the Board of Special Inquiry
rancisco, California, and dismissed the
appeal.

States on bond, pending the final disposition of the appeal for admission to the United States as a citizen in the penal sum of \$1,000.00 required of the plaintiff by said Immigration and Naturalization Service, prior to plaintiff's temporary release from custody.

X.

That because of all the said decisions and orders of the officers of the Department of Justice, plaintiff has been denied his right and privilege to enter and remain in the United States as a citizen thereof, the plaintiff, having been denied by the Attorney General of the United States, who is the head of the Department of Justice of the United States, the right to enter and reside permanently in the United States as a citizen thereof, now brings this complaint and prays as follows:

(1) That a judgment be entered declaring that plaintiff, Wong Wing Foo, is a citizen of the United States.

(2) That the defendant be directed to release the plaintiff from the custody or control of the Immigration and Naturalization Service.

(3) That the defendant cancel and set aside any order for plaintiff's deportation to China and exonerate said appearance and departure bond.

(4) For such other and further relief as the Court may seem just and proper and the law and the case may require.

ates of America,
California,
County of San Francisco—ss.

Ving Foo, being first duly sworn, deposes
as follows:

is the plaintiff named in the foregoing
that the same has been read and ex-
him and he knows the contents thereof;
ame is true of his own knowledge except
e matters which are therein stated on his
n and belief, and as to those matters he
to be true.

/s/ WONG WING FOO.

ed and sworn to before me this 8th day
ber, 1949.

/s/ ALBERT K. CHOW,

ublic in and for the City and County of
Francisco, State of California.

mission expires March 26, 1951.

ed]: Filed September 8, 1949.

District Court and Cause.]

MOTION FOR DISMISSAL

ow the defendant herein, J. Howard Mc-
Attorney General of the United States,
g an appearance in the nature of a special

the District of California, and Edgar L. Assistant United States Attorney for the District of California, moves the Court to dismiss the complaint in the above-entitled action on the following reasons:

(1) That the complaint fails to show that there is any action against the defendant in this jurisdiction for the reason that it fails to show that plaintiff is ever a permanent resident of the Northern District of California and within the jurisdiction of this Court.

(2) That under Section 503 of the Nationality Act of 1940 (54 Stat. 1171, 1172; Title 8, U.S.C.A. 903) this Court is without jurisdiction of the subject matter of this suit for the reason that the complaint fails to show that plaintiff claims a permanent residence at any place in the United States or within the Northern District of California or within the jurisdiction of this Court, as required by Section 503 of the Nationality Act of 1940.

This motion will be based on the provisions of Section 503 of the Nationality Act of 1940 (U.S.C.A. 903), which provides that an action of this nature must be brought in the District Court of the United States for the District of Columbia or in the District Court of the United States for the district in which such person claims permanent residence; also on plaintiff's complaint not being filed with the Court and the affidavit of Lloyd I. Assistant District Adjudications Officer of

nited States Immigration and Naturaliza-
-ice at San Francisco, California, show that
tiff, Wong Wing Foo, is not now a perma-
-ent of the United States, and further that
tiff, Wong Wing Foo, in truth and fact
r crossed the Immigration barrier and in
-ation of law has never been legally ad-
-o the United States for permanent resi-

/s/ FRANK J. HENNESSY,

United States Attorney,

/s/ EDGAR R. BONSALL,

Assistant U. S. Attorney,

Attorneys for Defendant.

rsed]: Filed October 19, 1949.

District Court and Cause.]

AFFIDAVIT

E. Gowen, being first duly sworn, on oath
and says:

e is Assistant District Adjudications Offi-
-igration and Naturalization Service, Port
-ancisco; that in connection with his official
-uch he is joint custodian of the files of
-igration and Naturalization Service at
-of San Francisco, California; that he is
-with the contents of the file of the Imm-

Foo, bearing number 1300-85974; that the said Wong Wing Foo shows that he arrived at the Port of San Francisco, California, on November 26, 1948, aboard the Philippine Air Line and applied for admission to the United States; that Wong Wing Foo was temporarily detained by the Immigrant Inspector aboard the Philippine Air Lines plane upon his arrival; that he was thereafter held for examination by the Board of Special Inquiry; that the Board determined he was an alien and not a citizen of the United States; that on December 16, 1948, Wong Wing Foo was refused admission to the United States by the Board of Special Inquiry on the ground that he was an immigrant alien not in possession of an immigration visa as required by Section 213 of the Immigration Act of May 26, 1924 (49 Stat. 213) and under executive Order 8766, and that he was not in possession of a passport; that pending the disposal of his case by the Immigration and Naturalization Service the subject was released from custody upon the giving of an appearance bond in the sum of \$1,000 on December 13, 1948; that the subject's appeal from excluding decision of the Board of Special Inquiry was dismissed by the Commissioner of the Immigration and Naturalization Service, at Washington, D. C., on February 1, 1949; that his further appeal was dismissed by the Attorney General's Board of Immigration Appeals.

temporary or permanent residence or for
purpose whatsoever.

deponent saith not.

/s/ LLOYD E. GOWEN.

and sworn to before me this 19th day
of October, 1949.

/s/ EDWARD C. EVENSEN,

Clerk, U. S. District Court, Northern Dis-
trict of California.

Witness my hand and seal of office this 19th day of October, 1949.

District Court and Cause.]

ORDER DENYING MOTION TO DISMISS

An action filed in this Court on September 8, 1949. Plaintiff seeks to avail himself of the declaration of citizenship accorded by Section 503 of the Nationality Act of 1940 (54 Stat. 1171, 8 U.S.C. 903), to establish his claimed United States citizenship. Section 503 permits any person, within the United States or abroad, who is denied the right of a naturalization by the United States by any government or department on the ground that he is not a national, to institute an action for a judgment declaring him to be a national. The action may be brought either in the District Court for the District of Columbia or in the District Court of the district

plaintiff's father, Wong Yem, is now an American citizen of the United States at the time of plaintiff's birth in China on June 22, 1928. On October 26, 1948, plaintiff, for the first time, applied to the United States to join his father, who now resides in Lodi, Northern District of California. Upon his arrival, he was detained by the Immigration and Naturalization Service, and, after being interviewed by a Board of Special Inquiry, was denied admission, on December 16, 1948, on the grounds that he had failed to prove that he is the son of Wong Yem. The Commissioner of Immigration and Naturalization affirmed the action on January 24, 1949, as did the Board of Immigration Appeals on July 20, 1949. Pending the outcome of the administrative proceedings, plaintiff had been released on bond on December 13, 1948. Since that time, he has resided with his father at Lodi, California.

Defendant has moved to dismiss on two grounds: (1) that the plaintiff cannot in good faith establish a permanent residence within the jurisdiction of this Court; (2) that Section 503 was intended to apply only to persons who at one time had permanently resided in the United States and who encountered difficulties in returning after a temporary absence abroad because of the more stringent provisions of the expatriation sections of the Nationality Act of 1940.

In an opinion in the case of Look Yuen v. Acheson, #28984, filed today, Judge Erskine

g an action under Section 503, and in this
en though he now lives and always has
oad. The plaintiff here is in an even
position inasmuch as he has been residing
strict for more than a year.

tion to dismiss is denied.

December 15, 1949.

/s/ LOUIS GOODMAN,

United States District Judge.

sed]: Filed December 16, 1949.

District Court and Cause.]

ANSWER TO COMPLAINT

now Howard J. McGrath, as Attorney
of the United States, Defendant in the
ion, by and through his attorneys, Frank
ssy, United States Attorney, and Edgar
ll, Assistant United States Attorney, and
r to Plaintiff's complaint admits, denies
es as follows:

I.

ing Paragraph I of the complaint, De-
denies that Plaintiff is a resident of the
f San Joaquin, City of Lodi, State of
a, and affirmatively states that Plaintiff is
and never has been a resident within the

maintains a lawful domicile with his father, Wong Yem, and affirmatively asserts that Plaintiff has no lawful domicile in the State of California or elsewhere in the United States and that Wong Yem is not the father of Plaintiff.

II.

Admits the allegations contained in Paragraph II of the Complaint.

III.

Answering Paragraph III of the Complaint, Defendant denies the allegations contained in Paragraph III of the Complaint and affirmatively asserts that Plaintiff does not have a cause of action against the Defendant pursuant to the provisions of Section 503 of the Nationality Act, as amended and/or pursuant to Section 903 of the Code annotated.

IV.

Answering Paragraph IV of the Complaint, Defendant denies that Plaintiff is a citizen or national of the United States and affirmatively alleges that Plaintiff is a citizen and national of China.

V.

Answering Paragraph V of the Complaint, Defendant denies the allegations contained in Paragraph V of the Complaint that Plaintiff was born on June 22, 1928, at Cheung Sing Village, District, Kwangtung Province, China; denies

he said Wong Yem; admits that Wong
citizen of the United States and was a
the United States on June 22, 1928; ad-
Wong Yem resided in the United States
June 22, 1928; denies that at birth Plain-
a citizen and/or a national of the United
reason of Section 1993, United States
Statutes, or in any other manner whatso-
affirmatively states that Plaintiff is not
never has been a citizen and/or a national
nited States; admits that Lim Shee is a
d citizen of the Republic of China.

VI.

ant admits that the Plaintiff departed
na for the United States for the purpose
g his alleged father. Defendant has no
e as to Plaintiff's allegation that he in-
hereafter to reside in the United States
full advantage of the rights and privileges
l States citizenship and likewise to per-
duties as a citizen and/or national of the
tates and for that reason denies such alle-
admits that Plaintiff arrived at the Port
rancisco, California, on November 26, 1948,
ppine Air Lines, seeking admission to the
tates as a citizen thereof.

VII.

the allegations contained in Paragraph

VIII.

Admits the allegations contained in Part VIII of the Complaint.

IX.

Denies that the Plaintiff was ever admitted to the United States on bond or otherwise, but affirmatively alleges that Plaintiff was temporarily released from the custody of the Immigration and Naturalization Service on December 13, 1951, upon the filing of a bond in the sum of \$1,000 cash, and that upon his return to custody of the Immigration and Naturalization Service should his appeal from the excluding decision be dismissed.

X.

Admits that the Plaintiff has been denied the right and privilege to enter or remain in the United States as a citizen and/or national of the United States, and affirmatively alleges that the Plaintiff has no right or privilege to enter or remain in the United States, and that Plaintiff is not a citizen and/or national of the United States.

Wherefore, Defendant prays that the Complaint herein be dismissed: that the relief prayed for be denied, and that Defendant recover from Plaintiff his proper costs herein.

/s/ FRANK J. HENNESSY

United States Attorney

/s/ EDGAR R. BONSALL

Assistant U. S. Attorney

AMENDED ANSWER

now Howard J. McGrath, as Attorney of the United States, Defendant in the action, by and through his attorneys, Frank J. McGrath, United States Attorney, and Edgar R. McGrath, Assistant United States Attorney, and in answer to Plaintiff's complaint, admits, denies and asserts as follows:

I.

In Paragraph I of the complaint, Defendant denies that Plaintiff is a resident of the County of San Joaquin, City of Lodi, State of California, and affirmatively states that Plaintiff is not a resident and never has been a resident within the County of San Joaquin, California, or elsewhere in the United States. Defendant further denies that Plaintiff has a lawful domicile with his putative father, Wong Yem, and affirmatively asserts that Plaintiff has no lawful domicile in the State of California or elsewhere in the United States, and that Wong Yem is not the father of Plaintiff.

II.

In Paragraph II of the complaint, Defendant denies the allegations contained in Paragraph II of the complaint.

III.

In Paragraph III of the Complaint, Defendant denies the allegations contained in Paragraph III of the Complaint.

against the Defendant pursuant to the provisions of Section 503 of the Nationality Act as amended and/or pursuant to Section 903 of the Code of Federal Regulations as amended and/or as otherwise stated.

IV.

Answering Paragraph IV of the Complaint, the Defendant denies that Plaintiff is a citizen and/or national of the United States, and affirmatively alleges that Plaintiff is a citizen and national of China.

V.

Answering Paragraph V of the Complaint, the Defendant denies the allegations contained in Paragraph V of the Complaint that Plaintiff was born on June 22, 1928, at Cheung Sing Village, District, Kwangtung Province, China; denies that Plaintiff's lawful blood father is Wong Yem; denies that his lawful blood mother is Lim Shee; denies that the wife of the said Wong Yem; admits that Wong Yem is a citizen of the United States and that Plaintiff is a citizen of the United States on June 22, 1928; admits that Wong Yem resided in the United States prior to June 22, 1928; denies that at birth Plaintiff was a citizen and/or national of the United States by reason of Section 1993, United States Revised Statutes, or in any other manner; denies, however, and affirmatively states that Plaintiff is now and never has been a citizen and/or a national of the United States; admits that Lim Shee is a native and citizen of the Republic of China.

VI.

Defendant admits that the Plaintiff departed Manila for the United States for the purpose of joining his alleged father. Defendant has no objection as to Plaintiff's allegation that he intends hereafter to reside in the United States and to take full advantage of the rights and privileges of United States citizenship and likewise to perform his duties as a citizen and/or national of the United States and for that reason denies such allegations. Defendant admits that Plaintiff arrived at the port of San Francisco, California, on November 26, 1948, via Philippine Air Lines, seeking admission to the United States as a citizen thereof.

VII.

Defendant denies the allegations contained in Paragraph 7 of the Complaint.

VIII.

Defendant denies the allegations contained in Paragraph 8 of the Complaint.

IX.

Defendant admits that the Plaintiff was ever admitted to the United States on bond or otherwise, but affirms and alleges that Plaintiff was temporarily removed from the custody of the Immigration and Naturalization Service on December 13, 1948, upon posting of a bond in the sum of \$1,000 conditioned upon his return to custody of the Immigration and Naturalization Service should his appeal from the

Admits that the Plaintiff has been denied the right and privilege to enter or remain in the United States as a citizen and/or national of the United States, and affirmatively alleges that the Plaintiff has no right or privilege to enter or remain in the United States, and that Plaintiff is not a citizen and/or national of the United States.

XI.

As a further and affirmative answer to the Plaintiff's complaint the Defendant admits that the Plaintiff, at the time of his arrival at the port of San Francisco, California, on November 26, 1948, via the Pacific Air Line plane, made application for admission to the United States as a citizen of the United States and presented his claim before a duly appointed and qualified Board of Special Inquiry under Section 17 of the Immigration Act of February 6, 1917 (8 U.S.C. 153); that Plaintiff was excluded from entering the United States by the Board of Special Inquiry on December 9, 1948, as an alien immigrant not in possession of valid immigration documents; that said excluding decision was affirmed by the duly appointed representative of the Attorney General of the United States; that the decision of the Board of Special Inquiry is final under Section 17 of the Immigration Act of 1917 (8 U.S.C. 153). Therefore the Plaintiff appeals to the Board of Special Inquiry in this case.

dismissed; that the relief prayed for be
and that Defendant recover from Plaintiff
costs herein.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ EDGAR R. BONSALL,
Assistant U. S. Attorney.

sed]: Filed March 14, 1951.

WONG WING FOO,

Plaintiff,

vs.

J. HOWARD McGRATH, Attorney General,
United States,

Defendant.

CHOW AND SING,
550 Montgomery Street,
San Francisco, California,
Attorneys for Plaintiff.

FRANK J. HENNESSY,
United States Attorney,

EDGAR R. BONSALE,
Assistant United States Attorney,
Post Office Building,
San Francisco 1, California,
Attorneys for Defendant.

OPINION

Murphy, District Judge.

This is an action brought under Section 1 of the Nationality Act of 1940 (54 Stat. 1171, 903), for the purpose of establishing the citizenship and nationality of the plaintiff.

plaintiff, Wong Wing Foo, was born in June 22, 1928. He first arrived in the States at San Francisco, California, on June 26, 1948, at which time he applied for admission under the provisions of 8 U.S.C.A.—(Section 1993, U.S.R.S.), as the foreign-born son of one Wong Yem, an American citizen. A Board of Special Inquiry was convened at the San Francisco office and after six days of hearings it concluded that the plaintiff was not the son of Wong Yem. The Commissioner of Immigration and the Board of Immigration Appeals affirmed this decision and the plaintiff was ordered excluded from the United States. Pending the hearing of this suit which was a judicial declaration of his citizenship, defendant has resided, under bond, with his alleged father at Lodi, California.

At the trial no documentary evidence of the relationship was introduced. Plaintiff and defendant testified that they were father and son, that they had not seen each other since the plaintiff was ten years old, and that with the exception of two letters written in 1945 and 1947 that there was no contact between them for a period of ten years. No letters were produced in connection with this correspondence.

Defendant contented himself with introducing evidence of the Immigration hearings. They consisted of the testimony of plaintiff, his alleged father,

They are replete with contradictions and inconsistencies.

At one point the alleged uncle told of his contact with this nephew in China during 1946 and 1947. Plaintiff corroborated and enlarged on this. Plaintiff Wong Gong then was shown a picture of the defendant. Plaintiff testified that he did not identify the defendant. He not only could not identify the defendant, but later withdrew all his former testimony, stating that he had never seen Wong Wing Foo, and that he had invented other vital details of plaintiff's testimony.

Another material contradiction appeared in plaintiff's testimony regarding the name of the defendant's mother. Plaintiff said it was "Lim Sun Sun." The alleged father, however, stated that it was "Ling Heung." When plaintiff's attention was directed to this variance he testified that he didn't know her name, but having seen the Chinese characters for "Sun Sun" written in a book in his house he had assumed they were his mother's name.

Discussion

It is plaintiff's contention that he has established a prima facie case of citizenship in that he was born in the United States and Wong Yem testified to the purported father-son relationship and defendant introduced no evidence in contravention thereof than the testimony taken before the Immigration Board.

As stated in *Siu Say v. Nagle*, 295 F. 61 (9th Cir. 1962):

"In cases of this character experi-

is therefore had to collateral facts for cor-
ration or the reverse."

collateral facts in this instance are to be
the transcripts introduced by the de-

ted above, they contain conflicting and
contradictory statements as to such facts
er the alleged uncle, Wong Gong, had
plaintiff in China on numerous occasions
1946 and 1947; whether Wong Gong knows
on who purports to be his nephew, and the
plaintiff's alleged mother. Discrepancies
particulars are not the kind that arise from
of the human mind. Testimony of the
uncle was vital in that he was the only
presented by the plaintiff who could estab-
k of identity between the adult now seek-
ssion and the six-year-old boy that Wong
reports to have left in China. His refusal
fy Wong Wing Foo and his denial of
s testimony was given great weight by the
tion Department. Plaintiff knew this. He
t avoid seeing the shadow it threw over his
et, significantly, he made no effort to bring
ong before this tribunal. He charges in his
t Wong Gong lied—yet he was careful not
ne lie to him before this court. Such an
hardly accords with plaintiff's present
ions of forthrightness.

plaintiff attempts to explain away his in-

suggests that "it is highly improper for a married woman to be known by her name" this the Commissioner of Immigration, whose case was before him on appeal, stated:

"(W)e believe that the applicant alleged father should have been able on the name of the applicant's mother are in truth, father and son. Certainly the applicant did not know his mother there is no reason for inventing one unless for the purpose of attempting to a fraudulent case."

The examples fixed on above are but illustrations of the discrepancies and contradictions with the testimony abounds.

Although, as a practical matter, it would be the decision in this case, defendant's success that when a person in plaintiff's position brought action under Section 503 "he is entitled to a greater review (of the administrative action on habeas corpus," is deserving of comment is the same contention that was before Judge Holtzoff in *Mah Ying Og v. Clark*, 81 F. Supp. 696, D.C. Dist. Col., and Judge Hall in *Guo Tung v. Clark*, 83 F. Supp. 482, D.C. Cal. In these cases these jurists held that to give such a construction to this section would be practically to nullify it. As stated by Judge Holtzoff, Section 503 "contemplates a trial de novo of the issue of citizenship

ering and wanting people a birthright of States citizenship is beyond value. And, the claim itself should be minutely scrutinized. This section plainly assumes that no claimant turned away without first being accorded judicial safeguard afforded by our democratic system.

Plaintiff has had the opportunity, in this action, to protect his patrimony. Upon him was the burden of establishing it by a preponderance of evidence. The decision of the District Court, 170 F. Supp. 312, affirmed 170 F.2d 397, 161 F.2d 397, certiorari denied 332 U.S. 839; rehearing denied 332 U.S. 842, 332 U.S. 849). This he has failed

to establish for the defendant.

The findings of fact and conclusions of law will be made in accordance with the rule.

Done: April 3, 1951.

Witness my hand and seal: Filed April 3, 1951.

District Court and Cause.]

STATEMENTS OF FACT AND CONCLUSIONS OF LAW

In the above-entitled cause, initiated pursuant to the writ of Habeas Corpus issued on October 14, 1940, C. 876, Title I, Sub-

on the 15th day of March, 1951, at 10:00
fore the Honorable Edward P. Murphy, t
presiding, sitting without a jury; plaintiff
ing by his attorneys, Jack W. Chow and
Sing, and the defendants by their attorney
J. Hennessy, United States Attorney for th
ern District of California, and Edgar R.
Assistant United States Attorney for said
and the evidence having been received,
Court having fully considered the same
make the following Findings of Fact a
clusions of Law:

I.

That the plaintiff, Wong Wing Foo,
in China on June 22, 1928.

II.

That the plaintiff first arrived in th
States at San Francisco, California, on M
26, 1948, at which time he applied for a
under the provisions of 8 U.S.C.A.—601(
tion 1993 U.S.R.S.) as a citizen of th
States, to wit: As the foreign-born son
Yem, an American citizen.

III.

That thereupon plaintiff was accorded a
by a Board of Special Inquiry at San F
California, following which hearing said
December 9, 1948, found that plaintiff wa

IV.

plaintiff thereon appealed from the decision of the Board of Special Inquiry to the Commissioner of Immigration who, on February 24, 1948, affirmed the excluding decision of said Board of Special Inquiry.

V.

Thereupon the said plaintiff appealed from the decision of the Commissioner of Immigration to the Board of Immigration Appeals who, on July 1, 1948, dismissed the appeal of the plaintiff and the plaintiff excluded from the United States.

VI.

On December 13, 1948, plaintiff was temporarily released under bond by defendant and since that time plaintiff has been residing at Lodi, California.

VII.

On March 15, 1951, plaintiff and Wong Yem appeared at the trial before this Court of the above-entitled cause.

VIII.

This Court, having fully considered all the evidence submitted at the trial of the above-entitled cause, finds that plaintiff is not the son of Wong

Conclusions of Law

I.

Title I, Subchapter V, Section 503, 54 S
also known as Title 8 U.S.C.A., Section 9

II.

That plaintiff is not a national or citizen
United States.

It Is Hereby Ordered that judgment be
denying said Petition for Declaration of Nationality
and that the defendant is entitled to a judgment
against plaintiff for his proper costs.

/s/ EDWARD P. MURPHY

United States District Judge

Approved as to form.

/s/ WILLIAM J. CHOW,

Attorney for Plaintiff

Receipt of Copy acknowledged.

[Endorsed]: Filed April 18, 1951.

United States District Court for the
District of California, Southern Division
No. 29118-R

VING FOO,

Plaintiff,

vs.

ARD McGRATH, Attorney General of
United States,

Defendant.

FINAL DECREE

above-entitled cause, having come on for
the 15th day of March, 1951, at 10:00
a.m., before the Honorable Edward P.
the Judge presiding, Jack W. Chow and
Sing appearing as attorneys for the plain-
named, and Frank J. Hennessy, United
attorney for the Northern District of Cali-
and Edgar R. Bonsall, Assistant United
attorney, appearing as attorneys for the de-
above named, and the evidence having been
and the Court having heard oral argument
ounsel for the respective parties and having
Findings of Fact and Conclusions of Law:
Therefore, by reason of the law and facts, it
is, Adjudged and Decreed by the Court as

That the Court finds in favor of the defendant and against the plaintiff, and specifically

(1) That the plaintiff is not the son of Yem.

(2) That by reason of the foregoing, the plaintiff is not a national or citizen of the United States.

II.

That the defendant recover his proper damages in this action. Judgment will be entered accordingly.

Dated: April 18th, 1951.

/s/ EDWARD P. MURPHY

United States District Court

Approved as to Form:

Dated: April 6, 1951.

/s/ WM. J. CHOW,

CHOW & SING,

Attorneys for Plaintiff

Lodged April 9, 1951.

[Endorsed]: Filed April 18, 1951.

Entered in Civil Docket April 19, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that this 4th day of May, 1951,

judgment of this court entered on the 18th April, 1951, in favor of defendant against plaintiff.

CHOW & SING,

By /s/ WM. J. CHOW,

Attorneys for Plaintiff.

resd]: Filed June 4, 1951.

District Court and Cause.]

COST BOND ON APPEAL

as, Wong Wing Foo, Plaintiff herein, has and or is about to prosecute an appeal to the States Circuit Court of Appeals for the Circuit from a judgment made and entered 8th, 1951, by the District Court of the States for the Northern District of California Southern Division.

Therefore, in consideration of the premises, assigned, Fidelity and Deposit Company of d, a corporation duly organized and existing under the laws of the State of Maryland and authorized and licensed by the laws of the State of California to do a general surety business in the State of California, does hereby undertake to provide on the part of J. Howard McGrath, General, Defendant, that they will prosecute the appeal to effect and answer all costs if

(\$250.00) Dollars, to which amount said
and Deposit Company of Maryland acknowledge
self justly bound.

And further, it is expressly understood
agreed that in case of a breach of any contract
the above obligation, the Court in the above
matter may, upon notice to the Fidelity and
Company of Maryland, of not less than
days, proceed summarily in the action on
which the same was given to ascertain the
which said Surety is bound to pay on account
such breach, and render judgment therefor
it and award execution therefor.

Signed, sealed and dated this 4th day
1951.

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND

[Seal] By /s/ E. DELVENTHAL,
Attorney-in-Fact.

Attest:

/s/ S. CLIMO,
Agent.

The premium charged for this bond is \$
annum.

State of California,
City and County of San Francisco—ss:

On this 4th day of June, A.D. 1951, before me,
Belle Jordan, a Notary Public in and for the

oned and sworn, personally appeared
elventhal, Attorney-in-Fact, and S. Climo,
f the Fidelity and Deposit Company of
l, a corporation known to me to be the per-
executed the within instrument on behalf
rporation therein named and acknowledged
at such corporation executed the same, and
wn to me to be the persons whose names
cribed to the within instrument as the At-
-Fact and Agent respectively of said corpo-
nd they, and each of them, acknowledged
t they subscribed the name of said Fidelity
osit Company of Maryland thereto as prin-
their own names as Attorney-in-Fact and
spectively.

ness Whereof, I have hereunto set my hand
ed my official seal at my office in the City
ty of San Francisco the day and year first
ritten.

/s/ BELLE JORDAN,
Public in and for the City and County of
San Francisco, State of California.
Commission Expires Nov. 9, 1951.

ersed]: Filed June 8, 1951.

In the District Court of the United States
Northern District of California, South
sion

Before: Hon. Edward P. Murphy,
Judge.

No. 29118

WONG WING FOO,

Plaintiff

vs.

J. HOWARD McGRATH, Attorney General
the United States,

Defendant

REPORTER'S TRANSCRIPT

Thursday, March 15, 1951

Appearances:

For the Plaintiff:

W. J. CHOW, ESQ.,
JACK W. SING, ESQ.

For the Government:

EDGAR R. BONSALE, ESQ.,
Assistant United States Attorney

The Clerk: Wong Wing Foo vs. McGrath
trial.

Mr. Bonsale: Ready. This case, Your Honor
wanted to see if certain admissions can be

Court probably knows, the plaintiff is a
and he doesn't speak English. Unless we
ify some of the issues, the testimony taken
n interpreter on cross-examination will be
gthy. However, certain statements have
n from the plaintiff and one of the wit-
o will be produced, he is putative father,
board of special inquiry, and if counsel
ulate that the testimony was taken before
of special inquiry in the case of the father
t might save time. Otherwise I will have
ch question and answer separately through
reter.

t state that the records of the board of
quiry is a record required to be kept by
rtment of Justice. It is kept pursuant to

ow: It is admitted just for the purpose
g that such a record exists, but not as
th of the facts so stated. I believe since
itutes a trial de novo, I believe we should
statements from the witnesses [2*] and
statements made and contained in the
ion files given by the witness could only
r impeachment purposes.

urt: In other words, you don't accept the
n, is that right?

ow: That is right.

urt: All right. Let me advise you right

I don't intend to make a screen out of

Mr. Chow: Your Honor please, we will
this, that such statements exist.

Mr. Bonsall: Do you admit to the truth
statement, that it is a truthful statement?

Mr. Chow: No, because that is within
say rule.

Mr. Bonsall: I still think we are going
the testimony in before the board. It is a
ment record, duly certified.

The Court: We will meet that when
to it.

Mr. Bonsall: All right.

Mr. Chow: Shall I proceed?

The Court: Proceed.

Mr. Bonsall: I might state what our
will be. It is simply the fact that he is not
son of the father.

Mr. Chow: And we believe that is not
Your Honor. [3]

(Thereupon Robert Park was sworn
interpreter.)

WONG YEM

called as a witness on behalf of the plaintiff
first duly sworn, testified through the Interpreter
as follows:

The Clerk: Please state your name to the Court.
A. Wong Yem.

Direct Examination

y of Wong Yem.)

na.

en?

ese Republic, the second year.

o is your father?

nsall: We will stipulate he is a citizen,

or. This particular witness is a citizen of

l States.

w: Thank you.

r Mr. Chow): What is your father's

A. Sare Wong.

ere is he now? A. In China.

roximately how old is he?

ut seventy-three.

at is your mother's name?

n Sui.

he living? [4] A. Yes.

v old is she, approximately?

ut sixty-one.

ere do they live now?

China.

you married, Mr. Wong Yem?

o are you married to? A. Lim She.

ere is Lim She living now?

China.

ve you any brothers and sisters?

ave four brothers, no sisters.

at are the names of your brothers?

(Testimony of Wong Yem.)

Q. You say you have four brothers?
include yourself? A. Yes.

Q. Is Wong Dim married? A. Y

Q. Who is his wife? A. Lee Sh

Q. Is Wong Sang married? A.

Q. Who is his wife? [5] A. Ho

Q. Is Wong Gong married?

A. Wong Gong's wife Hom She.

Q. Then who is the wife of Wong Sin

A. Ng She.

Q. Can you tell me if Wong Gong
family outside of his wife?

A. He has a wife and children.

Q. Will you describe his children, ple

A. Two daughters and one son.

Q. Do you know how old they are?

A. One two years old, one a little over
and one a few months old.

Q. Where is Wong Gong? A. In

Q. Has Wong Sing any children.

A. I don't know whether he has or not.
back already.

Q. Has Wong Dim any children?

Q. What is his name and age?

A. About two and a half years of ag

Q. Have you any children?

A. I have four.

Q. Who are they?

A. Wong Fao, Wong Gao, Wong Ho

ny of Wong Yem.)

ong Foo is here, and three boys in China.

here is Wong Gay? A. In China.

ong Hong? A. In China.

d Wong Keong? A. In China.

Wong Wing Foo married? A. Yes.

no is his wife? Who is he married to?

m She.

e your other sons married? A. No.

nce your first arrival in the United States

y times have you been to China?

rice, altogether.

en did you leave and when did you return

of the said trips?

e Republic, 16th year, I went to China.

Republic 18th year came back. Republic

I went.

nsall: I wonder if the Interpreter would

n in our calendar? I have some difficulty

Chinese years.

ow: May I have a calendar? [7]

inese Republic 23rd year, came back.

nsall: What year would that be?

ng: That is 1934.

y Mr. Chow): When did you say you

ried, Mr. Wong Yem?

inese Republic 16th year.

at was during the first trip to China?

s.

en was Wong Wing Foo born?

(Testimony of Wong Yem.)

Mr. Chow: Excuse me.

Q. (By Mr. Chow): Date of marriage

A. Chinese Republic 16th year.

Mr. Sing: That is 1927.

Mr. Bonsall: Do you have the month a

Mr. Sing: Month and day?

A. Seventh month, fourth day.

Mr. Sing: That would be August 1st, 19

Mr. Bonsall: Do you intend to cover the
absent facts?

Mr. Chow: No. I wanted to get the dates
purpose is to show he was in China at
when the child, the plaintiff, was born.

Q. (By Mr. Chow): When was Wong
Foo born? [8]

A. Chinese Republic 17th year, fifth mo
fifth day.

Mr. Sing: That would be June 22nd, 19

Mr. Bonsall: Correct, as to the date.

Q. (By Mr. Chow): In other words
Wing Foo was born during your first visit to

A. Yes.

Q. How old was Wong Wing Foo when
saw him in China?

A. About six years of age. About six
age.

Q. How long was your second visit to C

A. You mean the last time?

Q. Yes, fifth

ny of Wong Yem.)

onsall: Do you have the month there?

terpreter: Ninth month, 29th day.

ng: That would be November 8th, 1931.

By Mr. Chow): When did you return from
?

inese Republic the 23rd year, the sixth
ne third day.

ng: That would be July 14th, 1934.

By Mr. Chow): During the time you were
on these visits where were you living?
neung Sing Village.

that your native village? [9]

es.

uring your visits to China after your son
ing Foo was born you had occasion to see
e often? A. Yes.

ou were living in the same house with him?
es.

ow large was Cheung Sing Village?

out eleven homes, or eleven houses and a

here was your house located?

n the second row, the fifth house.

here are you living now, Mr. Wong?

odi.

hat is your occupation? A. Cook.

here is your son, Wong Wing Foo, living?

e lives at Stockton.

(Testimony of Wong Yem.)

English. I left him in Stockton to go to
where he has better situation to study.

Q. When Wong Wing Foo was admitted
bond——

Mr. Bonsall: Just a minute. I don't
has been admitted. He was released on bond
never crossed the Immigration Barrier. [10

Mr. Chow: That is right.

The Court: He was released in custody of
Immigration Service December 13th, 1944
filing of bond.

Q. (By Mr. Chow): Where was he living
mediately after his release?

A. He lived with me for some months.

Q. You say he is living in Stockton, California.
How far is Stockton from Lodi?

A. About 13 or 14 miles.

Q. How often do you see him, or does he
you?

A. Any time, my day off, I go to see him.

Q. Has he been to visit you? A.

Q. How often? A. At least once a week.

Q. Are you contributing to his support?

A. Yes.

Q. Is Wong Wing Foo working?

Q. What is he doing in Stockton?

A. Go to school.

Mr. Chow: That is all.

y of Wong Yem.)

a, was seen by you at the age of six, [11]
the next time you saw him?
haven't been to China since I saw him
as six.

you see your son in China or anywhere
e time he was six years old and the time
val here at the port of San Francisco?
except the date of the hearing.

Ving Foo married? A. Yes.

you know his wife's name?

n She.

ere is she? A. In China.

re you ever seen her since the time of the
arriage?

I haven't been to China.

urt: That is the plaintiff's wife, Mr.
ou refer to?

sall: The son's wife.

rt: That is what I mean, the plaintiff.

sall: Yes, the son's wife.

Mr. Bonsall): Does your son have any
your reputed son have any children?

mean my oldest son?

one that is seeking for declaratory judg-
tizenship? [12]

, he has a son.

at is his name? A. Wong Falk.

re you ever seen him? A. No.

(Testimony of Wong Yem.)

Q. Does he have any church or other showing the birth of the son in China?

Mr. Chow: I object to that. I believe been answered by the witness in his last

Mr. Bonsall: Rather ambiguous answer

The Court: He said there are no records in the village. Now he is asking if there is any record of any kind.

A. They have a school there, not a church or school; they don't have any record.

Q. (By Mr. Bonsall): The Chinese records show the birth in China?

A. I believe not.

Q. You believe not? Have you received letters from your son at any time from China?

A. Yes.

Q. Do you have any of those letters?

A. No, nothing important. I didn't keep any.

Q. Do you have any letters of any kind, important or not, received by you from your son?

A. No.

Mr. Chow: I object to this line of questioning. I don't see the relevancy as to the relations between the witness and the defendant's Honor.

The Court: Objection overruled.

Q. (By Mr. Bonsall): How much money, if any, did you send to China for the support of your son, Fong?

y of Wong Yem.)

I understand your testimony correctly
you only had one brother in the United

A. I have three brothers here.

three brothers here? One of them is Wong
that correct? A. Wong Din.

Wong Gong. Do you have a brother by the
Wong Gong? A. Yes.

one here in the United States?

.

where does he live?

San Francisco.

What address in San Francisco?

Monoma Street. [14]

Do you have Wong Gong as a witness before
the Board of Inquiry convened here in San
in the case of Foo?

Now: I object to that. I don't see the
of that.

Court: The record of that would be the best
Objection sustained.

(By Mr. Bonsall): Do you have Mr. Gong
in court today?

Now: Also objected to.

Court: Overruled.

Wong Gong, you mean?

(By Mr. Bonsall): Wong Gong?

Is Wong Gong married?

A. Yes.

What is his wife's name?

(Testimony of Wong Ten.)

A. Same place, Sonoma Street.

Q. Is she in Court today?

A. No, she is not.

Q. When was Wong Gong married?

A. Summer of the Chinese Republic
36th year.

Q. What are the names of the other two
who are [15] living in the United States?

A. Wong Din and Wong Sing.

Q. Where does Wong Din live?

A. Lives in the city.

Q. What address does he live at?

A. He goes in and out of Jackson Street.

Q. Is he married? A. Yes.

Q. What is his wife's name? A.

Q. Is he here in Court? A. No.

Q. Where does Wong Sing live?

A. He lives somewhere in the country.

Q. Do you know any better address than
lives somewhere in the country?

A. Somewhere near San Diego. But he
see me a little while ago. He has got some
job there so he didn't give me any address.

Q. Did I understand he doesn't know
is at the present time? Is that correct?

Mr. Chow: I object to that. I think he
answered that question.

The Court: Not to my satisfaction. Over.

A. No, I don't know. I didn't under

y of Wong Yem.)

y Mr. Bonsall): And what is the name
life? A. Lim Shi.

l you testify before the Board of Special
onvened in the case of Wong Wing Foo
an Francisco on December 6th, 7th and

A. Yes.

l this gentleman here in Court preside at
al Board of Inquiry hearing, Mr. Bert

A. Yes, both of them.

t particularly Mr. Norris was the presiding
hat correct?

s, the second time.

l you have Mr. Wong Gong as a witness
t Special Board of Inquiry?

e first time he was there, but he went—
e went there the second time I don't re-

l you talk with Mr. Wong Gong about the
given before the Board of Special In-

idn't tell him anything particular. I told
on came.

ell, did you talk with Mr. Wong Gong
ad testified before the Board of Special

ow: I don't see the relevancy.

urt: What is the purpose of that, whether
[17] to him after?

onsall: The purpose is to show what

(Testimony of Wong Yem.)
witness Wong Gong, who is not here at the
time.

Mr. Chow: I believe if you wish to go in, you should have Wong Gong here. I don't know whether he is using that for the purpose of impeaching the witness or not.

Mr. Bonsall: At this time—it is a little out of order—at this time I will ask be marked for identification a certified copy of the record of the Department of Justice in connection with the Special Inquiry Hearing held on December 6th, 1948.

Mr. Chow: For what purpose?

Mr. Bonsall: For identification at this time.

The Court: Received and marked for identification.

(Record of hearing before a Board of Special Inquiry was marked Government's
“A” for identification.)

Q. (By Mr. Bonsall): What is the name of your wife?

The Court: He has already told you, Lin.

Mr. Bonsall: All right.

Q. (By Mr. Bonsall): I show you a paper bearing Chinese characters—may I ask you if you have ever seen that before?—and if you have ever seen that before? A.

Q. Who put those characters on there? [

A. I wrote.

ny of Wong Yem.)

the time of the hearing? You mean the
before the Board of Special Inquiry, of

don't recall which time. There were three
ring.

d you sign this and offer this in evidence
e of the days of the three day hearing?

ow: I object to that question because I
eve it is clear. As I understand it, a thing
was not offered as evidence.

nsall: At the Board of Special Inquiry

ow: It was asked of him to write that
r name down.

nsall: I withdraw the question.

y Mr. Bonsall): You said you did sign
r with the Chinese characters, is that cor-

A. Yes, I wrote it.

here did you sign it?

the hearing.

whom did you deliver this paper?

the time of the hearing. I don't know who

d you hand it to Mr. Norris, the presiding
the hearing?

don't know to whom I gave it. I don't

9]

hat is the English equivalent of these char-

A. I didn't write the English

(Testimony of Wong Yem.)

A. It is my wife's name.

Q. And what is your wife's name in English?

A. Lim Shi, or also known as Lim Lee I.

Mr. Bonsall: I will ask it be received and marked for identification at this time.

The Court: It may be received and marked for identification.

(Slip of paper containing the name of the witness' wife in Chinese characters was placed in the Government's Exhibit "B" for identification.)

Q. (By Mr. Bonsall): Did you make a statement to have Wong Gong here today?

Mr. Chow: I object to that, your Honor.

The Court: Objection sustained.

Mr. Bonsall: I have here, your Honor, a Chinese and English translation of the testimony given by the witness before the Board of Special Inquiry. The witness doesn't speak English, apparently, I was asked to ask the Interpreter to interpret these questions from English to Chinese, and the answers from Chinese to English, and ask him if he made those questions and answers. Otherwise it will take quite some time to go into [20] each one of these questions and answers, and frankly our defense is largely based on the conflicting testimony that was given in this case.

Mr. Chow: I object to that, Your Honor. No statement ever statement is contained in there, if it is pertinent to the examination or cross-examination.

y of Wong Yem.)

urt: You mean the testimony of the man
different time?

ow: In an extra judicial hearing. It can
used for the purpose of impeachment, a
ther than this type. This constitutes a
ovo, and if he should bring in the pro-
r findings of the Court proceedings other
I believe it isn't admissible.

urt: That is one of the most peculiar
f a trial de novo that it has ever been
re to listen to.

ow: If I may ask, I don't understand
se of it. If he was using it for the purpose
ning the witness——

urt: In a trial de novo, if I am not very
error, the Court reviewed the testimony
previous hearing; and it also takes into
ion the testimony produced at this hear-
then arrives at its own conclusion based
testimony before the Special Board [21]
y, whatever it may be, and based on its
on and conclusions and the testimony ad-
the trial. That is the law, unless you show
ing to the contrary.

ow: In this particular action the sole
le basis is for determination of citizenship.

urt: I know that. Otherwise you wouldn't

(Testimony of Wong Yem.)

Mr. Chow: This is by Judge Holtzoff in
of Mah Ying Og vs. Clark:

"It is clear that the Statute contem-
trial de novo of the issue of citizenship
merely a review of the administrative

The Court: So far that isn't in conf-
what I said.

Mr. Chow: "Consequently, the mere fac-
matter was determined by an administrative
and subsequently in a habeas corpus pro-
does not bar this suit."

The Court: Right again. Nor am I b-
these proceedings as they are by the review

Mr. Chow: "The 1940 Statute, howev-
templates a reopening and a full judicial
of the entire issue of citizenship without
it merely to [22] a review of the admin-
action. In a habeas corpus proceeding, t-
might feel that it would have reached a
conclusion than that reached by the admin-
agency. Nevertheless, it would be constrain-
firm the action of the administrative agency
were substantial evidence sustaining such a
an action for a declaratory judgment u-
1940 Code, however, the Court determines a
issues de novo."

So that the only issue here is relationship

The Court: That is correct, but how an-
to determine all the issues de novo unles-

y of Wong Yem.)

urt: Put that in evidence.

asall: I will offer in evidence at this time
nt's Exhibit 1 for identification, being a
copy of the official record in connection
board of Inquiry hearing held in December,
onnection with the hearing on application
e entry into the United States.

ow: For the purpose of shortening the
gs and expediting it, I will stipulate to the
given by the witnesses here, that is, given
tness Wong Wing Foo and the witness
be examined later, that is by [23] the wit-
g Yem and Wong Foo.

asall: I will ask that the whole certified
nt record be introduced.

urt: If you don't ask for it, I will intro-
on my own motion.

asall: Yes, your Honor, and I have asked

ow: I will stipulate to the testimony, your

urt: All right.

ow: Because there is testimony of other
the record.

urt: I am going to read it all.

hereupon certified copy of record of Im-
tion and Naturalization Service hereto-
marked Government's Exhibit "A" for

(Testimony of Wong Yem.)
son's son, Foo's son? Did you ever see M
son? A. No.

Q. You say at different times you sent money to China. Did you send any money to your
Mr. Foo? A. I sent it to my wife.

Q. Were you supporting your wife in China?
A. Yes.

Q. How many times did you write to your wife in China?

A. Two or three times a year. Sometimes I wrote to him at Hong Kong, and then I sent the money to him in China. [24]

Mr. Bonsall: I have no further cross-examination with the record in evidence, your Honor.

Mr. Chow: That is all.

(Witness excused.)

WONG WING FOO

the plaintiff herein, being first duly sworn, deposes and says that through the Interpreter as follows:

Direct Examination

By Mr. Chow:

Q. Your name is Wong Wing Foo?

A. Yes.

Q. When were you born and where?

A. Chinese Republic, 17th year, fifth month.

Q. Where were you born?

ny of Wong Wing Foo.)

n English): About a year.

terpreter: He speaks some.

Through the Interpreter): About a year.

By Mr. Chow): Who are your parents?

e their names?

m She. Wong Yem.

here are they now? A. (Pointing).

ourt: Let the record show he is indicating

ss Wong Yem. [25]

By Mr. Chow): Where is your mother

A. In China.

e you married? A. Yes.

ho is your wife? A. Hom Toy Ping.

ave you any children? A. One son.

ho is he and how old? A. In China.

hat is his name and how old is he?

ong Falk. About three or four years of age.

ho are your grandparents, your paternal
ents? A. Wong Shar Loon.

he the father of your father?

es.

hat is the name of your paternal grand-

A. Hom Shi.

here are they now? A. In China.

here do they live in China?

ueung Sing Village.

as your father any brothers and sisters?

e has four brothers and no sister.

u mean four brothers including

(Testimony of Wong Wing Foo.)

Q. Who are they and where are they living?

A. Wong Din. That is the elder brother. Gong, the third brother. The fourth brother Sing.

Q. Where are they living now?

A. They all live in San Francisco. We lived in the country, small town somewhere.

Q. Have you ever seen any one of them?

A. Yes.

Q. Is Wong Gong married? A. Yes.

Q. Who is his wife and has he any children?

A. Hom Shi. Yes, two daughters and one son.

Q. Is Wong Sing married? A. Yes.

Q. Who is his wife and has he any children?

A. Ng Shi. Not when I arrived.

Q. Has Wong Ding—is Wong Ding married?

A. Yes.

Q. Has he any children? A. One son.

Q. What is the size of your native village?

A. Not very large. Six small houses and one large ones.

Q. And where is your house located in the village?

A. On the second row, the fifth house. [

Q. Can you describe your house? Will you describe your house?

A. Yes. There are two rooms and then there is a partition with boards. Two kitchens.

Q. Where are you living now?

ny of Wong Wing Foo.)

ing to school.

re you working? A. No.

ow are you able to support yourself?

y father supports me.

ou mean your father Wong Yem?

es.

ow often do you see your father Wong

A. About once a week.

o you go to visit him or does he come to
?

t times I go to see him and other times
to see me.

ou said you were attending school in
? A. Yes.

hat school?

ey have a special class for Chinese.

ow: That is all. Mr. Bonsall? [28]

Cross-Examination

Bonsall:

hat is your mother's name?

m Shi.

hat is your mother's full name?

don't know. She is always known as Iim

show you this document with Chinese char-
d ask you if you have ever seen this before?

es. I don't understand the English part

(Testimony of Wong Wing Foo.)

Q. Where did you write it?

A. At the Immigration Service.

Q. In December, 1948, at the time of your hearing before the Board of Special Inquiry,

A. Somewhere around about that time.

Q. To whom did you deliver it or hand it over?

A. Some of the inspectors.

Q. Did you deliver it to this man known as Norris?

A. I can't recognize him. I wouldn't know him. I can't tell.

Q. What do those Chinese characters represent?

A. Lim Sun Sun.

Q. Where did you get that name from?

A. I found it in the books.

Q. Didn't you tell the officers at the Naturalization Hearing this was the name of your mother?

A. Well, they asked me so, so persistent in trying to get somebody's name, so I just wrote down something.

Q. Didn't they ask you for your mother's name at the time you wrote this name?

A. Well, they were so persistent about getting my mother's name, I told them Lim Shi, and the Chinese I just wrote down some name.

Q. Didn't you tell them at the Board of Special Inquiry Hearing at first you didn't know your mother's name?

A. Yes, I did.

y of Wong Wing Foo.)

now it is Lim Shi.

Bonsall: I will ask this document be marked for identification, your Honor—in evidence, rather.

Court: Received and marked.

Sheet of paper entitled “Name of alleged mother” and containing Chinese characters was admitted into evidence as Government’s Exhibit C.)

Bonsall: I will ask this, marked heretofore for identification, be marked in evidence. That is a document in Chinese in which the father gave the name of his wife, and this document in which he gave the name of his mother.

Court: So ordered.

Document heretofore marked Government’s Exhibit B for [30] identification was admitted into evidence.)

Mr. Bonsall): Do you know if Wong testified before the Board of Special Inquiry in your case?

Law: I object to that.

Court: It is in the record, isn’t it?

Bonsall: It is, your Honor. I think, your Honor, that the record in evidence, no further cross-examination.

Law: That is our case, your Honor. We have proved a prima facie case. We have

The Court: All right, I will read the r

Mr. Chow: We will submit it entire records in evidence, your Honor.

The Court: Matter submitted.

Mr. Chow: At this time, your Honor, by Mr. Bonsall a couple of days ago he w Section 17 of the Immigration Act of 19 trolling in that the decision of the Board o Inquiry is final. We are objecting to tha wish to file authority for that.

The Court: What is it?

Mr. Chow: This is Mah Ying Og vs. decided on December 8th, 1950, and has reported yet. I have here a brief filed by th ment. The Government was appellee in th They pose this question, if I may read [31]

“In the opinion of defendant-app question presented is: ‘Does Section Immigration Act of 1917, making th of a Board of Special Inquiry on ex an alien final, apply to action broug Section 503 of the Nationality Act o declare an appellant a citizen where was born in China of a parent who be a native born citizen?’ ”

That question has been answered in the Although I haven't the decision, I have he ping from the Washington Post, I believ a story about that which states that the

r words, Section 17 does not control Section 904 of the Nationality Act. I also wish to state that Section 904 of Title 8 also permits any person who is a citizen of the United States to be filed by a person who is a citizen of the United States.

Mr. [Name]: If the Court please, in this case I am asking for the liberty of preparing a memorandum of the testimony at the Special Inquiry hearing and the facts in the case as disclosed upon the testimony this morning. I am covering in substance what I believe to be the facts of the case. I ask leave to file this memorandum and will furnish counsel with one. [32]

Mr. [Name]: I object to that.

Mr. [Name]: On what grounds?

Mr. [Name]: I will withdraw that; I am sorry.

Mr. [Name]: Do you want to file one?

Mr. [Name]: No, except that he is introducing the testimony of Wong Gong, who was a witness at the hearing. He is introducing his testimony. I am asking in order to have his testimony before the Court. I should produce the witness.

Mr. [Name]: Why didn't you produce him?

Mr. [Name]: In the first place, I have asked the Court whether he is available and he is working in the country, and——

Mr. [Name]: You have the process of the Court before you.

Mr. [Name]: I don't want to subject him to loss of time before your Honor.

I, Official Reporter and Official Reporter
certify that the foregoing transcript of 3
a true and correct transcript of the mat
contained as reported by me and thereaft
to typewriting, to the best of my ability.

/s/ KENNETH J. PECK.

[Endorsed]: Filed June 19, 1951. [33

[Title of District Court and Cause.]

CERTIFICATE OF CLERK
TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the Uni
District Court for the Northern District
nia, do hereby certify that the foregoin
companying documents and exhibits, lis
are the originals filed in this Court in
entitled case and that they constitute the
appeal herein as designated by the attorn
appellant:

Complaint for declaratory judgment.

Motion to dismiss.

Affidavit of Lloyd E. Gowen.

Order denying motion to dismiss.

Answer to complaint.

Amended answer to complaint.

ecree.

of appeal.

and on appeal.

ation of record on appeal.

er's transcript, March 15, 1951.

ant's Exhibit A.

ant's Exhibit B.

ant's Exhibit C.

ness Whereof I have hereunto set my hand
d the seal of said District Court this 21st
ne, 1951.

C. W. CALBREATH,
Clerk.

By /s/ C. M. TAYLOR,
Deputy Clerk.

sed]: No. 12986. United States Court of
for the Ninth Circuit. Wong Wing Foo,
, vs. J. Howard McGrath, Attorney Gen-
e United States, Appellee. Transcript of
Appeal from the United States District
r the Northern District of California,
Division.

une 21, 1951.

/s/ PAUL P. O'BRIEN,
the United States Court of Appeals for
Ninth Circuit.

WONG WING FOO,

Plaintiff,

vs.

J. HOWARD McGRATH, Attorney General

United States,

Defendant.

STATEMENT OF POINTS

Plaintiff sets forth the following points
he intends to rely on appeal:

1. The court erred in holding that plaintiff failed to sustain the burden of establishing relationship to his father, Wong Yem, by preponderance of evidence.

2. The court erred in admitting and considering the records and transcripts of the immigration proceedings other than the transcripts of testimony of the plaintiff and his father, Wong Yem, the admission of which was stipulated by counsel for the plaintiff.

CHOW AND SING,

By /s/ W. J. CHOW,

Attorneys for Appellant.

Court of Appeals and Cause.]

ATION OF RECORD ON APPEAL

Now, the appellant by his attorneys, Chow
in the above-named matter, hereby design-
entire record to be included in the tran-
saction on appeal which is being considered
for the determination of the points on
which he intends to rely on appeal.

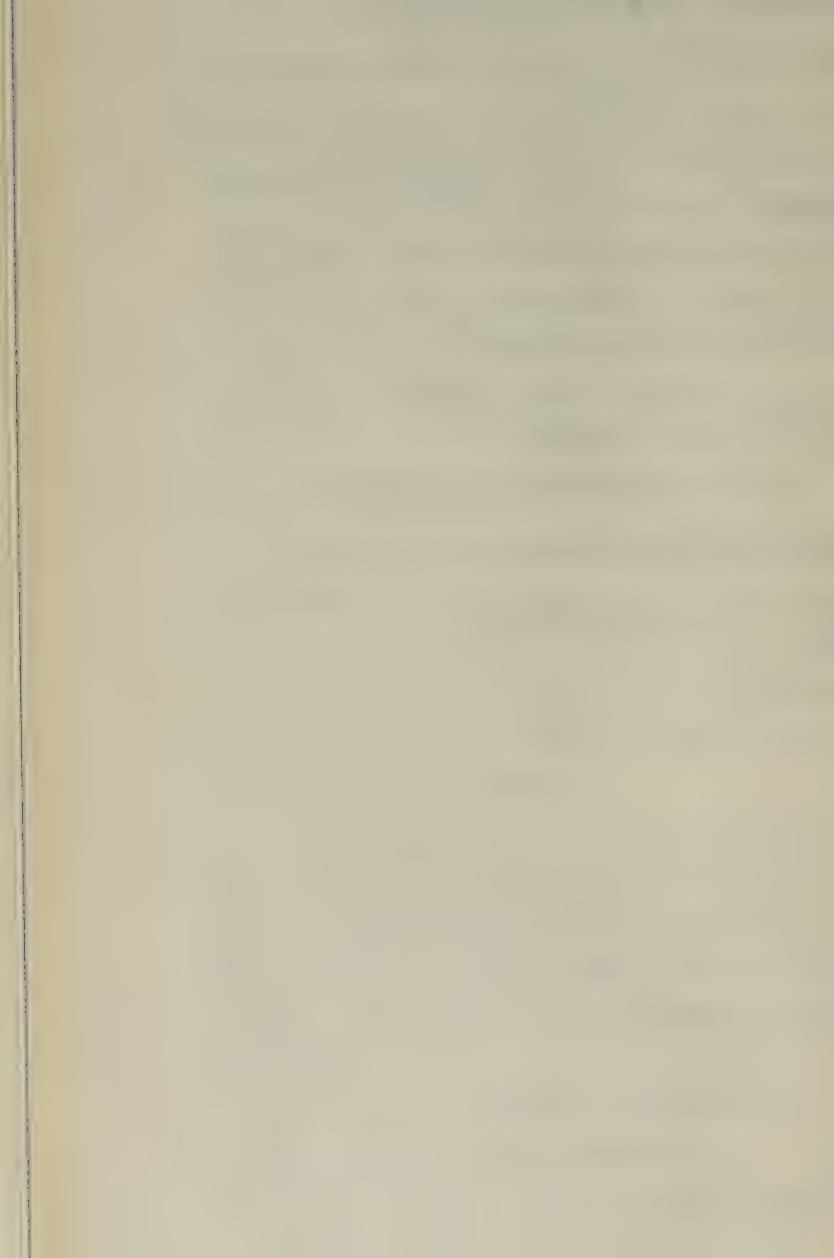
CHOW AND SING,

By /s/ W. J. CHOW,

Attorneys for Appellant.

of Copy acknowledged.

ed]: Filed June 29, 1951.



No. 12,986

United States Court of Appeals
For the Ninth Circuit

NG Foo,

Appellant,

RD McGRATH, Attorney Gen-
the United States,

Appellee.

APPELLANT'S OPENING BRIEF.

CHOW AND SING,

550 Montgomery Street, San Francisco 11, California,

Attorneys for Appellant.



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United States Court of Appeals For the Ninth Circuit

WING Foo,

Appellant,

WARD McGRATH, Attorney Gen-
of the United States,

Appellee.

APPELLANT'S OPENING BRIEF.

STATEMENT OF THE CASE.

tion in this case was brought in the Court
nder Section 503 of the Nationality Act of
Stat. 1171; 8 U.S.C.A. 903) for the purpose
ishing the citizenship of the appellant. The
t, Wong Wing Foo, claims to be a citizen
onal of the United States. He claims to have
n in China on June 22, 1928. He arrived in
ed States at the Port of San Francisco, Cali-
n November 22, 1948, and applied before the
ion authorities for admission as an Ameri-
on, being the legitimate blood son of Wong

that the appellant failed to satisfactorily establish that he is the blood son of Wong Yem and is not entitled to be admitted to the United States as a citizen thereof. It is conceded by the immigration authorities, however, that appellant's alleged father, Wong Yem, is a citizen of the United States. The decision of said board was appealed to the Commissioner of Immigration and Naturalization and then to the Board of Immigration Appeals. The decision of the Board of Special Inquiry was affirmed and appellant was ordered excluded from the United States. Thereafter, appellant instituted the writ of habeas corpus in the Court below seeking a judicial declaration of his citizenship. The case came to trial without a jury. The appellant and his alleged father, Wong Yem, were presented as witnesses by the prosecution to establish the father and son relationship. The appellant offered no evidence or witness other than the immigration records pertaining to the application of the appellant for admission before the immigration authorities. The Court found for the defendant. It is on this judgment that the appellant, seeking even a declaration of his United States citizenship and nationality, prosecutes this appeal.

JURISDICTIONAL STATEMENT.

The Court below had jurisdiction by the reason of the fact that this is an action for a declaratory judgment.

Nationality Act of 1940 (54 Stat. 1171, A. 903).

Court has appellate jurisdiction pursuant to Law 72, 81st Congress, approved May 24, U.S.C.A. 1291 and 1292).

STATUTES INVOLVED.

Amendment XIV to the Constitution of the United States, Section 1, reads:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside."

Section 6 of the Revised Statutes of the United States, Acts of April 14, 1802 and February 10, 1855 (as amended by Act of May 24, 1934, Section 1), reads:

"Children heretofore born or hereafter born within the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

Section 503 of the Nationality Act of 1940 (8 U.S.C. § 503) provides, in so far as pertinent here:

"Any person who claims a right or privilege

or executive official thereof, upon the ground that he is not a national of the United States, a natural person, regardless of whether he is within or without the United States or abroad, may institute a writ of habeas corpus against the head of such Department or against such person in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence. A judgment declaring him to be a National of the United States. * * *

STATEMENT OF POINTS.

Appellant sets forth the following position which he intends to rely on appeal:

1. The Court below erred in holding that appellant has failed to sustain the burden of establishing his relationship to his father, Wong Yem, by a preponderance of evidence.

2. The Court below erred in admitting and considering the records and transcripts of the immigration proceedings other than the transcripts of the testimony of the plaintiff and his father, Wong Yem, the admission of which was stipulated by counsel for the plaintiff.

ARGUMENT.

At the outset we wish to stress the fact

a review of the proceedings had before the States Immigration Service.

Yah Ying Og v. McGrath, 187 F. (2d) 199;

an Seow Tong v. Clark, 83 F. Supp. 482;

hin Wing Dong v. Clark, 76 Fed. Supp. 648;

. S. v. Clark, 82 Fed. Supp. 412;

hu Leong v. Shaughnessy, 88 Fed. Supp. 91.

evidence and testimony must be produced and the conduct of the trial is similar to that of a new trial and as if no former proceedings or trial had.

A hearing de novo literally means a new hearing or a hearing the second time. (18 C.J. 486.)

A hearing contemplates an entire trial of the controversial matter in the same manner in which the same was originally heard. It is in no sense a review of the hearing previously held, but is a complete trial of the controversy, the same as if no previous hearing had ever been held." (Italics ours.)

Pollier & Wallis, Ltd. v. Astor, 9 Cal. (2d)

202, page 205.

In the *Application of Murra*, 166 F. (2d)

petition of naturalization was heard in open court where the witnesses were examined before the Judge Major said:

* * *the hearing before the court is not for the purpose of reviewing the recommendations of the Examiner; it is a hearing de novo and*

ther the testimony heard by the Examiner, nor his findings, nor his recommendation are of consequence." (Italics ours.)

All this is in direct opposition to the position of the judge who, during the instant trial, ruled

"In a trial *de novo*, if I am not very much mistaken, *the Court reviewed the testimony taken at a previous hearing*; and it also takes into consideration the testimony produced at this hearing, and then arrives at its own conclusion based on its own opinion and conclusions and the testimony adduced on the trial. That is the law, unless you show me something to the contrary." (Italics ours.)

Transcript of Record, page 53.

Appellant contends that he is a citizen of the United States on the ground that he has established a *prima facie* presumption that he is the son of Wong Yem, an American citizen, by a preponderance of evidence. The lower Court, in its opinion, said appellant has the burden to establish his patrimony by a preponderance of evidence, and that he has failed to do so. Inferentially, the appellant has made out a *prima facie* case. It is a well recognized fact that no official records of vital statistics are kept in China, which accounts for the introduction of evidence of birth of the appellant. At the trial, the appellant and his alleged father, Wong Yem, testified that they are father and son and

Wong Yem is a cook working in Lodi, California and living at his place of work, and the appellant is staying in Stockton, California, about 100 miles apart, attending school. They visit and see each other every weekend and the appellant is supported by his father. It is because of his father's occupation and the fact that there is no adult education program for foreign speaking people in Lodi that the appellant moved to Stockton and is not presently staying with his father in Lodi.

Notwithstanding the cumulative effect of the repeated assertions made over and over again by the father that he has a son, Wong Wing Foo, should create in the mind of any reasonable man a belief that such a son exists. Thus we believe the burden of proof imposed on the plaintiff to establish that he is the lawful son of Wong Yem has been met and that he has made his prima facie case.

In contrast to the affirmative and positive showing made by the appellant, appellee presented no witnesses and contented himself with the introduction of the records and transcript of the immigration hearings. In the lower Court's opinion, it accepted the statements made before the Immigration Board of Special Inquiry and contained in the records introduced by the defendant as exhibits to be the collateral facts in contravention of appellant's claim of father-ship of Wong Yem. In this connection the

and Wong Yem testified to the purported son relationship and defendant introduced evidence in contravention thereof than the testimony taken before the Immigration Board stated in *Siu Say v. Nagle*, 295 F. 67. In cases of this character experience has demonstrated that the testimony of the parties interested as to the mere fact of relationship may be safely accepted or relied upon. Records therefore had to be supported by collateral facts for confirmation or the reverse.' The collateral facts in this instance are to be found in the transcript introduced by the defendant."

Transcript of Record, pages 24 and 25

However, the instant case is different from *v. Nagle*, supra, which was a habeas corpus proceeding whereas the present matter is not a review of an administrative action, but is a trial *de novo*. The statements of Wong Yem and the appellants are consistent with those contained in the immigration records as given by them and members of their family throughout the years. On the question of the effect of the repeated claims and statements made on various occasions to the Immigration Service in the case of *Johnson v. Ng Ling Fong*, 17 F. 2d 11, the Court said:

"The records of the Immigration Department concerning the alleged father and his children since 1909 are so complete and the statements as to the number of births of his children

any reasonable doubt as to the relationship of the applicant and his alleged father."

In the case of *Louie Po Hok v. Nagle*, 48 Fed. 3, this Court commented:

"A similar case arose in *Ng Yuk Ming v. Tilghast*, 28 Fed. (2d) 547. There, '13 years before * * * the alleged father testified before the immigration authorities that he has a son bearing the name of the applicant, * * * which he affirmed on every occasion upon which he was asked to testify.' The decision of the Court was that the decision of the immigration officials was supported by the evidence."

Also:

Yung Yow v. Nagle, 34 Fed. (2d) 848 (C.C.A. 9th).

"To believe this case may be resolved upon two points. First, has the plaintiff-appellant made out a *facie* case; and second, if the answer is in the affirmative, has the defendant-appellee done anything to answer and rebut it?"

"Whenever litigation exists somebody must go through with it; the plaintiff is the first to begin; if he does nothing, he fails. If he makes a *prima facie* case and nothing is done to answer it, the defendant fails."

Wheeler on Evidence, 2d Edition, Sec. 176.

"The testimony of the appellant and that of his

agreement to matters and facts pertaining to the family, its activities, the native village and house, the association of themselves. They identified each other correctly. This testimony and showing alone should be sufficient to establish the relationship and, if uncontradicted by other evidence, warrant a verdict or judgment in appellant's favor.

"Prima facie evidence is a minimum quantity of evidence. It is that which is enough to raise a presumption of fact; or, again, it is that which is sufficient, when, un rebutted, to establish the fact."

Otis & Co. v. Securities & Exchange Commission, 176 F. (2d) 34.

What evidence or proof then, if any, was submitted by the appellee to offset and controvert positive affirmative evidence put forth by appellant? The appellee admitted that no evidence was submitted by the appellee other than the transcripts of the immigration hearings, particularly the testimony of Wong. As a part thereof, the introduction of which was objected to by appellant. The only justification for the introduction of such transcripts of records of the immigration hearings could be admitted under Section 1733 of Title 8, U.S.C.A. which provides, "(a) Books or records of accounts or of proceedings of any department or agency of the United States shall be admissible to prove a transaction or occurrence as a memorandum or

pts of testimony taken in the proceedings before the Board of Special Inquiry. They also contain the decisions of the Commissioner of Immigration, the Naturalization Service and the Board of Immigration Appeals dismissing the appeal of the appellant from the adverse decision of the Board of Special Inquiry denying that appellant is the son of the deceased and therefore not a citizen of the United States. We do not believe these transcripts of testimony are the decisions of the higher immigration authorities and come within the purview of any statute, Federal or other, providing for their admission as evidence in a judicial trial. Section 1733(a) of the Immigration and Naturalization Act, U.S.C.A. clearly means that only minutes of the immigration proceedings shall be admitted to the record to act as a memorandum of which the proceedings were made, and thus, the transcript of testimony should only be admitted to show or prove the facts from which the testimony was adduced as in *United States v. Anderson*, 10 F.2d 874, 10-11, 17-18, 71-72, 74-75, 77-78, 80-81, 83-84, 86-87, 89-90, 92-93, 95-96, 98-99, 101-102, 104-105, 107-108, 110-111, 113-114, 116-117, 119-120, 122-123, 125-126, 128-129, 131-132, 134-135, 137-138, 140-141, 143-144, 146-147, 149-150, 152-153, 155-156, 158-159, 161-162, 164-165, 167-168, 170-171, 173-174, 176-177, 179-180, 182-183, 185-186, 188-189, 191-192, 194-195, 197-198, 200-201, 203-204, 206-207, 209-210, 212-213, 215-216, 218-219, 221-222, 224-225, 227-228, 230-231, 233-234, 236-237, 239-240, 242-243, 245-246, 248-249, 251-252, 254-255, 257-258, 260-261, 263-264, 266-267, 269-270, 272-273, 275-276, 278-279, 281-282, 284-285, 287-288, 290-291, 293-294, 296-297, 299-300, 302-303, 305-306, 308-309, 311-312, 314-315, 317-318, 320-321, 323-324, 326-327, 329-330, 332-333, 335-336, 338-339, 341-342, 344-345, 347-348, 350-351, 353-354, 356-357, 359-360, 362-363, 365-366, 368-369, 371-372, 374-375, 377-378, 380-381, 383-384, 386-387, 389-390, 392-393, 395-396, 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Co., 274 U.S. 693 at page 703, 47 S. Ct. L. Ed 1302 * * *”

Also *Moran v. Pittsburgh-Des Moines Co.*, 86 Fed. Supp. 255.

In the case of *United States v. Internationalvester Co.*, supra, where the Government sought to introduce as evidence a report of the Federal Trade Commission consisting of statements, testimony, and other documentary exhibits, the Court, in rejecting such evidence as inadmissible, said:

“In support of its alternative contention that competitive conditions have not been established by bringing about a situation in harmony with public interest the Government relies in large measure upon various statements and tabulations contained in the report of the Federal Trade Commission which was introduced in evidence over the objection of the International Company. It is entirely plain that to treat the statements and report—based upon an ex parte investigation and formulated in the manner hereinabove set forth—as constituting in themselves substantial evidence upon the questions of fact here involved violates the fundamental rules of evidence by titling the parties to a trial of issues of fact upon hearsay, but upon the testimony of persons having first-hand knowledge of the facts, who are produced as witnesses and are subject to cross-examination * * *”

Further supporting the contention of the

ings we quote the appropriate words of Section 20 of American Jurisprudence at page 578 579:

The mere fact that testimony has been given in the course of a former proceeding between the parties to a case on trial is no ground for its admission in evidence. The witness himself, if available, must be produced the same as if he were testifying de novo. His testimony given at a former trial is mere hearsay. This rule applies to testimony given by all witnesses at the former trial whether they were expert or lay witnesses."

E. Yarbrough Turpentine Co. v. Taylor, 201 Ala. 434, 78 So. 812, citing R.C.L.;

Savannah, F. & W. R. Co. v. Flannagan, 82 Ga. 579, 9 S. E. 471, 14 Am. St. Rep. 183;

Joseph v. Union R. Co., 116 Mo. 636, 22 S.W. 794, 38 Am. St. Rep. 626;

New York C. R. Co. v. Stevens, 126 Ohio St. 395, 185 N. E. 542, 87 A.L.R. 884;

Madden v. Duluth & I. R. R. Co., 112 Minn. 303, 127 N.W. 1052, 21 Ann. Cas. 805.

It is clear that if the defendant wanted to rely so much upon the alleged uncle's statements, he should have produced him as a witness instead of depending upon his extrajudicial testimony. In the case of *United States v. Campanaro*, 63 F. Supp. 811, the court said:

It is elementary in our system of law that the

Therefore, evidence which does not derive its value solely from the credibility of the declarant but rests also on the veracity of another person is termed 'hearsay' and is ordinarily inadmissible. *Hopt. v. People of Territory of Utah*, 12 U.S. 574, 4 S. Ct. 202, 28 L. Ed. 262. The essence of such evidence is that the other person whose credibility the jury must rely is not present in court and cannot be subjected to cross-examination. However, not every oral statement is hearsay. An extrajudicial statement offered in evidence does not come within the hearsay rule. It is only when the extrajudicial statement is offered to establish the truth of the fact so stated that the hearsay rule can apply. Where the extrajudicial statement is offered without reference to the truth of the matter extrajudicially asserted, merely to prove that the oral statement, or that a written statement, exists, then the evidence is without the hearsay rule."

The Court continued:

"It should be noted that there is statutory authority for permitting the government to prove the same facts by offering in evidence a copy of the government records under the seal of the department. This statute merely codifies the common-law exception to the hearsay rule, that the statement of a person whose statement is offered is reliable for adequate reason and where there is a substantial probability of the truthfulness of the statement. If the evidence is offered then, the evidence is not hearsay."

1420 et seq.; *Demeter v. United States*, 62 D. C. 208, 66 F. 2d 188; *United States v. Scoat*, 4 Cir., 4 F. 2d 193. However, even this rule does not permit the contents of government records to be proved by parol testimony as here done. *Nock v. United States*, 2 Ct. Cl. 11,

Also:

United States v. Packard Sedan, 23 F. 2d 865.

The situation as the instant case arose in *Lee v. United States*, 49 F. (2d) 24. In that case the defendant sought to overcome the prima facie case against the appellant by the introduction of certain government records. The lower Court held for the government and ruled that such records were admissible. Thereafter, the Appellate Court reversed the judgment,

and thus appears that the court unconsciously allowed the erroneously admitted record to influence him in the consideration of the case. This is a striking illustration of the danger of getting into the record evidence not admissible under the recognized rules. If these records were considered in the decision of the case, it would seem that the defendant should be discharged from custody. In judicial proceedings the court is restricted in the reception of evidence to only such evidence as meets the requirements of legal proof."

view of the well-established principles of evi-

tions the entire immigration records as evidence to answer the prima facie case established by appellant. His opinion shows that his decision as to the appellant's claim was predicated principally upon the contents and statements in the transcripts of testimony, particularly the testimony of an uncle named Wong, who made contradictory statements in the immigration hearings, corroborating and then contradicting his meeting with the appellant in Hong Kong. This uncle has shown himself in that proceeding to be untrustworthy in his statements and hence the appellant rightfully refused to call him as a witness. *Falsus in uno, falsus in omnibus*. If the appellant decides to rely upon the testimony of Wong Go, it is elementary that he should be called by the appellant, as suggested by the trial judge on page 63 of Transcript of Record.

"In order to establish a right to introduce the testimony of a witness given at a former trial it is incumbent upon the proponent of such testimony to lay a proper predicate for its introduction by showing the unavailability of the witness who gave the testimony sought to be produced. In other words, the burden of satisfying the court of the validity of the excuse for non-production of witness lies upon the party seeking to introduce the testimony given by him at the former trial. It must be shown either that the witness is dead, insane, or beyond the jurisdiction of the court or on diligent inquiry cannot be located."

mer trial cannot be produced as witness on the
ond trial. In the absence of proof of some
h circumstance, testimony of this character
be rejected."

0 Am. Jur. Sec. 698 at page 587.

CONCLUSION.

submit, briefly and simply, that the proceeding
he trial Court was in the nature of a new
examine the facts and testimony for a judi-
termination of the issue, "Is the appellant the
Wong Yem, a citizen and national of the
States, and therefore a citizen and national
United States?" It was not a hearing to re-
e administrative proceedings had before the
ation Service and the evidence, findings and
ons adduced and developed therein. The ap-
submitted the entire immigration records as
evidence to rebut the presumption created
appellant. However, from authorities cited,
scripts of testimony and the opinions which
art of the immigration files are inadmissible
ompetent evidence, and therefore could not
uld not be used to rebut and contravene the
ublished by the appellant. Without the unre-
nd untrustworthy statements of the alleged
Yong Gong, what then has the appellee offered,

petent evidence was offered by the appellee. Accordingly, the appellant has established his case by a preponderance of evidence.

It is, therefore, respectfully asked that the judgment for the defendant awarded by the Court be reversed, and that appellant be declared a citizen and national of the United States.

Dated, San Francisco, California,
September 12, 1951.

Respectfully submitted,
CHOW AND SING,
Attorneys for Appellant

No. 12,986

United States Court of Appeals
For the Ninth Circuit

JOHN FOO,

Appellant,

JOHN MCGRATH, Attorney General
of the United States,

Appellee.

BRIEF FOR APPELLEE.

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United States Court of Appeals

For the Ninth Circuit

WING FOO,

Appellant,

S.

WARD MCGRATH, Attorney Gen-
of the United States,

Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

Appellant filed an action, pursuant to Section
of the Nationality Act of 1940 (54 Stat. 1171; 8
903), in the Court below seeking a declara-
tion that he is a national and citizen of the
United States.

Appellant arrived at the Port of San Francisco, Cal-
ifornia on November 22, 1948 and applied for admis-
sion as the foreign born son of an American citizen.
He was detained by the Immigration and Naturali-
zation Service and accorded a hearing before a Board
of Special Inquiry convened pursuant to 8 U.S.C.

Wong Yem, and he was excluded as an alien without possession of a valid immigration visa. The decision of the Board of Special Inquiry was upheld by the Commissioner of the Immigration and Naturalization Service and subsequently affirmed by the Board of Immigration Appeals. The appellant then brought his complaint in the Court below seeking a judgment declaring him to be a national and citizen of the United States.

In the course of the trial, the certified record of the proceedings before the Immigration and Naturalization Service was introduced into evidence over the objections of counsel for appellant. The lower court found for the defendant and from that judgment appellant now prosecutes this appeal.

ARGUMENT.

Appellant set forth the following points upon which he intends to rely:

1. The Court below erred in holding that appellant has failed to sustain the burden of establishing his relationship to his father, Wong Yem, by a preponderance of evidence.
2. The Court below erred in admitting into evidence the records and transcripts of the immigration proceedings other than the original transcripts of testimony of the plaintiff.

I.

ICIAL RECORDS AND TRANSCRIPT OF THE ADMINISTRATIVE PROCEEDINGS RELATIVE TO APPELLANT ARE ADMISSIBLE IN EVIDENCE.

Appellant in his brief first considered the section upon which he relies, that is "whether the original and transcript of the immigration proceedings are admissible in evidence."

Appellant emphasizes that 8 U.S.C. 903 (Sec. 503, Emergency Act of 1940) contemplates a trial *de novo*, and assumes that such a trial precludes the trial court from considering evidence presented at the administrative hearing.

Appellee agrees that 8 U.S.C. 903 contemplates a trial *de novo*, but disagrees as to the meaning and application of the term. It is believed that the majority Judge Murphy correctly held, that in an action such as this, the Court should not only consider evidence produced at the trial, but should also consider the record prepared during the administrative proceedings.

Appellant, pursuant to the provisions of 8 U.S.C. 903, seeks a writ of habeas corpus in equity to be tried without a jury, before the Judge of a United States District Court. In the absence of proceedings the "Hearsay Rule" is rejected. (31 C.J.S. Para. 210, page 945.)

In the admission and review of evidence in an equity case, the Court possesses a broad discretion and is very liberal in the admission of evidence on

ment to the issues will be considered.
Para. 478, 47 Fed. (2d) 621, 640.)”

When the Board of Special Inquiry found appellant was not the blood son of Wong Yem, in substance that *appellant was attempting to illegally enter the United States.*

The Courts of the United States have recognized the ability of the Immigration and Naturalization Service to ferret out fraudulent claims to United States citizenship. This view was expressed by the United States Supreme Court in *Tulsides v. Insular Co.* 262 U.S. 258, at 265, wherein the Court stated as follows:

“* * * leave the administration of the law to the law; the law intends it should be left; to the discretion of officers made alert to attempts at evasion of it and instructed by experience of the law, the action which will be made to accomplish every end.”

The present action is a suit in equity with the traditional requirement that he who seeks equitable relief must come into Court with clean hands. This principle was applied by the Supreme Court in the case of *Hyland v. Millers* 262 Fed. (2d) 1003, affirmed 91 Fed. (2d) 735, reversed 92 Fed. (2d) 462, certiorari denied 308 U.S. 645, stated:

“In a case involving fraud, the Court has no latitude in admitting evidence in every instance relative to the condition and relation of the parties and subject matter and every

United States Supreme Court, in discussing an involving fraud, stated in the case of *Castle Bullard*, 64 U.S. 172, 187:

where fraud is of the essence of the charge, necessarily give rise to a wide range of investigation, for the reason that the intent of the defendant is, more or less, involved in the issue. Experience shows that positive proof of fraudulent acts is not generally to be expected, and for this reason, among others, the law allows a resort to circumstances, as the means of ascertaining the truth. Great latitude, says Mr. Starkie, is justly allowed by the law to the reception of direct or circumstantial evidence, the aid of which is constantly required, not merely for the purpose of remedying the want of direct evidence, but of supplying an invaluable protection against imposition." (1 *Stark, Ev.* p. 58.)

In many years this Honorable Court has recognized that false claims to U. S. citizenship have been made by persons seeking to illegally enter the United States. In the case of *Siu Say v. Nagle*, 295 U.S. 1, when considering a Chinese relationship, this Honorable Court stated:

"In cases of this character experience has demonstrated that testimony of the parties in interest as to the mere fact of relationship can not safely be accepted or relied upon."

The Honorable Court then quoted from the *Santovito v. United States*, 282 U.S. 300 (5 L. Ed. 454):

as in relation to the country of his birth, in a vessel on a particular voyage, or in a particular place, if the fact is otherwise it is extremely difficult to exonerate from the charge of deliberate falsehood the courts of justice, under such circumstances, bound, upon principles of law, and moral justice, to apply the maxim '*falsus in uno, falsus in omnibus.*' " (Italics ours.)

The appellant has cited the case of *Gan See*, 83 Fed. Supp. 482, in support of his argument that the immigration records should not have been introduced into evidence. Although the above case held that under 8 U.S.C. 903 to be a trial *de novo*, the court did consider the immigration records as introduced on page 486:

"There was put in evidence the various transcripts of the proceedings had before the immigration officers and agencies."

Thus the Court considered the records submitted by the government, along with the testimony given at trial, and then found that the plaintiff had failed to sustain his burden of proof. The Court's attitude is also invited to footnote 3 on page 485 in the cited case:

"There has just come to hand the opinion of the Supreme Court in *George Holtzoff of the District of Columbia v. Mah Ying Og v. Clark et al.*, D.C. 81 Fed. Supp. 696, 697, where the Court held and pronounced that Sec. 503 'contemplates a trial de

It is noted that the Court did not find, in the case *Ying Og v. Clark*, supra, that the records of administrative hearing were inadmissible. The Honorable Judge Holtzoff stated at page 697:

"The 1940 statute, however, contemplates a *review* and a full judicial hearing of the entire question of citizenship without confining it *merely* to a review of the administrative action." (Italics supplied.)

The language used by the Honorable Judge Holtzoff indicates that in his opinion an action under 8 U.S.C. § 903 incorporates not only new evidence taken at the trial, but also the *reopening* and *review* of the entire administrative procedure. The Court's action, as was stated by the Honorable Judge Holtzoff in the case at bar, arrive at its own conclusion after taking into consideration all the evidence.

Although the specific question as to the admissibility of immigration records into evidence under the provisions of 8 U.S.C. § 903 has not been previously determined, other authorities indicate the record of an administrative hearing should be admitted into evidence. The Compensation Act provides by statute for a hearing *de novo*. In the case of *Worn v. Anaconda Copper Mine Co.*, 43 P. (2d) 663, 667, the Supreme Court of Montana interpreted that statute in *Dosen v. East Butte Copper Mine Co.*, 130 Mont. 100, 30 P. (2d) 100, as follows:

"The term 'de novo' as used in the statute, is

emphasize the fact that after all the statute meant, *that all the evidence taken by the Ct. and all of the additional evidence taken by the Ct. should be considered together and that that evidence as a whole, the Ct. should make judgment.*" (Italics ours.)

The United States Code provides ample authority for the introduction into evidence of the immaterial records objected to by appellant's counsel. 28 U.S.C. Sec. 1732 reads as follows:

**"RECORD MADE IN REGULAR COURSE
OF BUSINESS.**

In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of a book or in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of the transaction, occurrence, or event, if made in the regular course of any business, and if it appears from the regular course of such business to be a memorandum or record at the time of the transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of the writing or record, including lack of knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall *not affect its admissibility.*

The term 'business', as used in this section, includes business, profession, occupations,

Courts, in considering the above section, in the functions of government agencies within the definition of the term "business".

Lein v. United States, 8 Cir. 1949, 176 F. (2d) 184. Cert. den. 1949, 338 U.S. 870, 70 S. Ct. 145 (voting lists);

United States v. Ward, 2 Cir. 1949, 173 F. (2d) 628 (Selective Service record);

Forwood v. Great American Indemnity Co., 3 Cir. 1944, 146 F. (2d) 797 (Navy service record);

Pollock v. Metropolitan Life Insurance Co., 3 Cir. 1943, 138 F. (2d) 123 (birth certificate);

Munter v. Derby Foods, Inc., 2 Cir. 1940, 110 F. (2d) 970, 133 A.L.R. 255 (coroner's death certificate).

Court, in the case of *Moran v. Pittsburgh-Des Moines Steel Co.*, 86 F. Supp. 255, on pages 279-280, follows:

) The purpose of the exception of the hearsay rule, as I read the authorities, where reference is made to reports formulated by an agency of the government by virtue of a congressional authority is to make possible the presentation of facts or circumstances which appear in that report where it is necessary to rely on what is in the report in order to avoid a miscarriage of justice.

* * * * *

Public records compiled in the regular

tion on the grounds that the inquisition was in the nature of a judicial proceeding wherein the right of cross examination was amply safeguarded and protected. * * *

The United States Court of Appeals, 3rd Circuit, when considering the above case, stated as follows on page 473 of 183 F. (2d) 467:

“The report is no less admissible because it contains conclusions of experts which are based upon hearsay evidence as well as upon observation. These circumstances, by virtue of the hearsay exception provision, go to weight rather than to admissibility.”

The United States Court of Appeals for the Third Circuit stated in the case of *Klein v. United States*, cited supra, on pages 187-188, as follows in its opinion on the voting records:

“Being public records made contemporaneously with the event which they reflect, they are presumptively correct and are ‘writing of fact.’ * * * made as a memorandum or record of an act’, within the meaning of Title 28 U.S.C. Sec. 1732 (now 28 U.S.C.A. Sec. 1732); *Hoffman v. United States*, 8 Cir., 143 F. (2d) 795; *United States v. Hoffman*, 318 U.S. 109, 63 S. Ct. 477, 80 L. Ed. 645, 144 A.L.R. 719. The argument of course that the voting records go to the effect or weight of the evidence rather than to its admissibility.”

Section 1733 of Title 28 U.S.C.A. is also applicable and reads as follows:

e. 1733. GOVERNMENT RECORDS AND PAPERS; COPIES.

) Books or records of account or minutes of department or agency of the United States be admissible to prove the act, transaction or occurrence as a memorandum of which the same be made or kept.

) Properly authenticated copies or transcripts of any books, records, papers or documents of any department or agency of the United States be admitted in evidence equally with the originals thereof. June 25, 1948, c. 646, 62 Stat.

Applying the above statute to the case at bar, the records of the Immigration Service are admissible to the Board of Special Inquiry was held. In the transcript of the proceedings are presumed to be correct. As to this latter point, counsel for the appellant has not challenged the correctness or authenticity of the documents offered in evi-

The appellant has cited as authority *United States v. ...*, 63 F. Supp. 811, and as quoted by the court on page 14 of his brief, the Court stated:

However, not every oral or written extra-judicial statement offered in evidence comes within the hearsay rule. It is only where the extra-judicial statement is offered to establish the truth of the fact so stated that the hearsay rule can be applied. *Where the extra judicial statement is of-*

that the oral statement, in fact, was made, and the written statement, in fact, exists, then the case is without the hearsay rule." (Italics ours.)

The immigration records were not introduced to prove the truth of the words spoken. In the record is so interwoven with discrepancies that it becomes obvious many of the statements cannot be reconciled. It therefore follows that the transcript was offered in evidence not to prove the truth of the word spoken, but to establish that oral statements were made.

The portion of the administrative record to which the appellant specifically objected was the testimony of his alleged uncle, Wong Gong. During the course of the administrative hearing, the appellant permitted Wong Gong as a witness in his own behalf. The hearing conducted by the Board of Special Inquiry is semi-judicial in nature. The parties in interest before the Board of Special Inquiry were the same as before the Court below. The appellant was represented by the same counsel who now brings this appeal. There was opportunity for cross-examination of the witness. As a practical matter, the appellant had the records of the Board of Special Inquiry produced at the trial. Counsel for the appellant asked the Court to consider Wong Gong's testimony given at the Board hearing. The following questions and answers appear on page 63 in the transcript of the record:

the other proceeding. He is introducing his testimony. I believe in order to have his testimony before the Court he should produce the witness before the Court. Why don't you produce him?

Mr. Chow. In the first place, I have asked the witness whether he is available and he is working in the city, and——

The Court. You have the process of the court returnable to you.

Mr. Chow. I don't want to subject him to loss of wages, your Honor.

The Court. All right."

On the above testimony, it appears that the only objection advanced by the appellant for the non-production of Wong Gong, was that it might subject him to loss of wages.

The appellant alleges that the defendant below had no objection to presenting Wong Gong as a witness. Such an objection is not consistent with the facts. The appellant alleges that he is the nephew of Wong Gong, and that he could not have produced Wong Gong at the time of the trial. In fact, from the statement of Mr. Chow, *supra*, it appears that Wong Gong was as available as a witness. Under such circumstances, a strong presumption arises that had Wong Gong been called as a witness, his testimony would have been adverse to the appellant.

Honorable Judge Murphy, relative to the objection to the production of Wong Gong as a witness, stated in his

“* * * Testimony of the alleged uncle in that he was the only witness presented by plaintiff who could establish a link of relationship between the adult now seeking admission and the six year old boy that Wong Yem purports to have left in China. His refusal to identify Wong Yem and his denial of plaintiff's testimony was given great weight by the Immigration Commission. Plaintiff knew this. He could not have seen the shadow it threw over his claim without significantly, he made no effort to bring Wong Gong before this tribunal. He charged in his brief that Wong Gong lied—yet he was not to put the lie to him before this court. This omission hardly accords with plaintiff's protestations of forthrightness.”

Should one party fail to produce an essential witness, where he has the power to do so, a strong presumption arises that if the witness was produced, his testimony would be against him. In the case of *United States v. Venetian Blind Corporation, et al.*, 21 F. 913, affirmed 111 F. (2d) 455, the Court stated: “and applying the familiar rule that where it is material testimony to establish a fact, and in the present ability of the litigant to produce it (he) fails to do so, or offers a reasonable explanation for such failure, *the presumption follows that if the testimony, if presented, would be against such party.*” *Mammoth Oil Company v. United States*, 13 U.S. 13, 48 S. Ct. 1, 72 L. Ed. 137.” (Italics)

The United States Supreme Court in *Mammoth Oil Company v. United States*

Familiar rules govern the consideration of evidence. As said by Lord Mansfield in *Blatch v. Archer* (Cowper 63-65): 'It is certainly a maxim that all evidence is to be weighed according to the weight of proof which it was in the power of one side to have produced, and in the power of the other side to have contradicted.' " (page 51.)

Page 52, quoted *Commonwealth v. Webster*, 5 Mass. 316:

But when pretty stringent proof of circumstances is produced, tending to support the charge, and it is apparent that the accused is so situated that he could offer evidence of all the facts and circumstances as they existed, and show, if such was the truth, that the suspicious circumstances can be accounted for consistently with his innocence, and he fails to offer such proof, the natural conclusion is that the proof, if produced, and of rebutting would tend to sustain the charge."

Defendant is not in a position to complain that evidence, Wong Gong, was not produced, when it was in his power to do so.

Chicago M. St. P. & P. R. Co. v. Slowik, 184 Ill. 2d 920.

The Court's attention is invited to the untenable position which the government would be placed, should it be allowed to introduce into evidence the records of its administrative hearings. The Court may take judicial notice that there are few, if any, public

Government has evolved a system of record-keeping of the genealogy of Chinese claimants to United States nationality. These records constitute the best evidence available, and are in most instances the only documentary evidence, to assist the Courts or the administrative agency, in determining the veracity of a claim to United States nationality, made by persons of the Mongolian race.

In practice, the records of the family history are superior to the testimony of the parties in court, and in effect constitute the best evidence. It may be seen that the appellee when defending this type of action, has nothing on which to rely but the record and transcript of the administrative proceedings.

II.

IT WAS INCUMBENT UPON APPELLANT TO ESTABLISH CLEAR AND CONVINCING EVIDENCE HIS CHINESE ORIGIN AND UNITED STATES NATIONALITY.

The appellant's first point asserts that the Court below erred in holding that appellant had failed to sustain the burden of establishing his relationship to his father, Wong Yem, by a preponderance of evidence. The appellant contends that if the immigration records were not admissible in evidence, then appellant made out a *prima facie* claim to United States nationality.

appellee asserts that the immigration records are admissible in evidence, and therefore the Court properly found that appellant had failed to meet the burden of establishing his relationship to the United States. The appellee further contends that a prima facie showing is insufficient to establish United States nationality.

Every person arriving at a port in the United States is presumed to enter as a citizen and national must meet the burden of proof in establishing his nationality. The burden rests on a Chinese applicant for admission to the United States to prove that he is the naturalized American citizen.

Yinn ex rel. Yee Suey v. Ward, 104 F. (2d) 900;

Wun Kock Quon v. Proctor, 92 F. (2d) 326;

Wing Yen Loy v. Cahill, 81 F. (2d) 809;

Wong Choy v. Haff, 83 F. (2d) 983;

Wong Ying Loon v. Carr, 108 F. (2d) 91.

There is a natural presumption that a person of the Chinese race is an alien and not a citizen of the United States. In the case of *Ex parte Lung Wing Wun*, 161 F. (2d) 212, 213 (habeas corpus action involving the Chinese person to return to the United States after a visit to China—hearing on the merits), the Court stated:

There is a natural presumption that a person of the Mongolian race coming to this country from China, is an alien, and to overcome that presump-

convincing evidence is essential, because a proceeding or inquiry having for its object the lawful determination of questions affecting the claim to citizenship asserted by such a person, he is himself an exhibit, his language, his conduct, and physical appearance must be considered as evidence tending to prove his alienage, and without evidence sufficient to create a belief that a person is, notwithstanding his alien parentage, a citizen by birth, *the natural presumption is thrown into a legal conclusion.*" (Italics ours.)

In the case of *Lee Sim v. United States*, 219 F.2d 435, the Circuit Court of Appeals, 2d Circuit, stated:

"In these deportation proceedings the natural presumption that a person of the Mongolian race is an alien and it is essential to overcome it and to show that he is entitled to the privileges of citizenship. *United States should be clear and convincing.*" (Italics ours.)

In the case of *Ex parte Chin Him, et al.*, 220 F.2d 133, the District Court of New York (1915) said:

"and finally, as was held in *Lee Sim v. United States*, supra, there is in a proceeding to determine the status of a person of the Mongolian race, *a natural presumption that he is an alien, which can only be thrown by clear and convincing evidence.*" (Italics ours.)

As stated supra in *Siu San v. Nagle*, et al.

is to the mere fact of relationship cannot be accepted or relied upon. This principle is also held by Justice Field of the Supreme Court of the United States, when writing the opinion of the Court in the case of *Quock Ting v. United States*, 140

The authorities cited, *supra*, it is well established that a person applying for admission into the United States as a foreign born citizen must establish citizenship by *clear and convincing evidence*. This requires more than a mere *prima facie* showing that the person is a citizen of the United States.

Applications were issued pursuant to the statute under which the present action was filed. Sec. 112.2 of the Immigration and Nationality Act of 1940 (52 Stat. 2046, 8 U.S.C. § 112.2) deals with persons arriving in the United States for the purpose of prosecuting, before the courts, their claim to United States nationality. The statute follows the presumption that all such persons applying for admission to the United States are to be aliens and not citizens of this country.

CONCLUSION.

The appellee respectfully submits that 8 U.S.C.A. § 1503 of the Nationality Act of 1940), contra a trial *de novo* in which the Court, sitting in equity, should consider all the evidence, including both a review of the administrative pro-

trial. The Court should then arrive at its conclusion based on all the evidence before the

It is well known that fraud abounds in real estate cases. The finding by an Administrative Board that the claimed relationship does not exist raises the inference of fraud. To exclude the testimony of the Administrative Hearing would place the judge in a very precarious position. He is forced to make a decision with only a portion of the evidence before him. Such a procedure could be in the lower Court declaring alien impostors to be citizens of the United States.

United States nationality is a prized possession and it is impossible to compute its value in monetary terms. Men have for years committed all manner of crimes in an effort to be recognized as citizens of the United States. The Courts in the years past have taken cognizance of the many and varied attempts to establish, through fraud, false claims to American nationality. As a natural result, a person of foreign birth, arriving for the first time in the United States, has been required by the Courts to prove by *clear and convincing evidence* that he is, in fact, a citizen of this country. Such a requirement is proper when we consider that the United States is a sovereign nation with the inherent power and obligation to protect its people and property from aliens of other lands. It is submitted that the judge in the Court below erred in stating the law when requiring the appellant to

a preponderance of evidence, that he is a
of the United States.

therefore, respectfully requested that the
for the defendant awarded by the Court
affirmed.

San Francisco, California,
October 10, 1951.

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Assistant United States Attorney,

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ARGREAVES,

VINE,

the Brief.

No. 12,986

United States Court of Appeals
For the Ninth Circuit

ING Foo,

Appellant,

RD McGRATH, Attorney General
United States,

Appellee.

REPLY BRIEF FOR APPELLANT.

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FILED

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**United States Court of Appeals
For the Ninth Circuit**

WING FOO,

Appellant,

•
HARD McGRATH, Attorney General
United States,

Appellee.

REPLY BRIEF FOR APPELLANT.

In our opening brief, we stressed the fact that a writ of habeas corpus was instituted in the United States District Court under Section 503 of the Nationality Act of 1906 (Stat. 1171; 8 U.S.C.A. 903) contemplates a trial *de novo* and not a review of the proceedings had before the United States Immigration Service. Appellant in his brief, agrees and concedes that such an appeal is a trial *de novo* but disagrees as to the meaning and interpretation of the term "de novo." He raises that question as to the admissibility of the immigration records into evidence in a case of this

(2d) 663, a Montana case, as his authority record of an administrative hearing should be admitted into evidence. This particular case came on appeal to the county district court of an appeal from a decision by the Industrial Accident Board as required by the Workman's Compensation Act of 1917. The case is not analogous to the situation in the present case. It was an appeal where the evidence and testimony taken before the Industrial Accident Board were before the Court for consideration and the Court allowed additional testimony to be introduced. Moreover, the language of the Court in the cited case clearly explains that the use of the term "de novo" in the statute is different than it is usually meant. The judge said,

"While it is true there may be some confusion as to the meaning of the term 'de novo' in the statute by the inclusion of the term 'de novo' that confusion has been explained by the Montana Supreme Court. In *Dosen v. East Butte Copper Mining Co.*, 10 Mont. 579, 254 P. 880, the court explained the term 'de novo', as used in the statute, is not synonymous with the familiar trial and takes place in a district court on appeal from the justice's court."

Appellee brought forth the words of the Honorable Judge Holtzoff in *Mah Ying Og v. Clark*, 100 Mont. 696, 100 P. 696, as indicating that an action under section 503 of the Nationality Act incorporates not only the evidence taken at the time of the trial, but also the reopening and review of the entire administrative

on to the opinion of the learned jurist who

The 1940 statute, however, contemplates a rearing and a full judicial hearing of the entire of citizenship without confirming it merely review of the administrative action. In a as corpus proceeding, the Court might feel it would have reached a different conclusion that reached by the administrative agency. rtheless, it would be constrained to affirm action of the administrative agency if there substantial evidence sustaining such action. n action for a declaratory judgment under 1940 Code, however, the Court determines all e issues de novo." (Italics ours.)

plainly seen that the Court there was differ-between a habeas corpus proceeding where t merely reviews the administrative action oceeding under Section 503 of the Nation-where the Court determines *all of the issues*

This view was further reiterated by the Appeals in 187 F. (2d) 199, page 201, when was brought to it for consideration.

case of *Pittsburgh S. S. Co. v. Brown*, 171 o 175, the Court clearly supports this view in

n our view, it is hardly open to question hat the court below correctly held that plain- was entitled to a trial de novo on the issue nted by its complaint for injunction, and a trial contemplates what the term implies.

the hearing of evidence, as though no action had been taken. Spano v. Western Growers, Inc., 10 Cir., 83 F.2d 150, 152 Luebeck, 377 Ill. 50, 35 N.E.2d 334, 339 v. Young, Court of Appeals of Ohio, 77 O 20, 65 N.E.2d 399. In the last cited case on page 406 of 65 N.E.2d, stated:

'A trial de novo connotes an examination of the testimony and an independent finding of facts fully as though the action was originally instituted in that court, in which event it is immaterial what errors were committed at the hearing before the board. Also it would be immaterial what the findings of the board were.'

Thus, we have no difficulty in concluding that the court properly refused to receive the transcript of testimony taken before the Department Commissioner on the particular issue involved. The court's opinion in the Crowell case supports such a conclusion. The court in Crowell, 336 U.S., page 297 of 52 S. Ct., said:

'We think that the essential independence of the exercise of the judicial power of the United States in the enforcement of constitutional rights requires that the federal courts should determine such an issue upon the law as recorded and the facts elicited before them.' (Italics ours.)

We again restate our position set forth in our brief that if the appellee decides to rely upon the testimony of Wong Gong, then he should be required to call him to testify in Court and not to rely upon

in appellee's power to produce him if he so particularly if appellee felt the testimony Gong would help to answer appellant's case.

ee contends that a mere *prima facie* showing is sufficient to establish one's United States nationality. He failed to distinguish the present judicial action from an administrative proceeding as one held by the United States Immigration Service. All the facts stated by appellee on this phase of his brief were facts of record and not judicial trials. The type of action is a judicial litigation where there are two parties, the proponent and the opponent. It is elementary that if the proponent makes out a *prima facie* case, not one of moral certainty or beyond reasonable doubt, but sufficient to support his allegation, the burden shifts to the opponent or defendant to answer it. If he does nothing about it, he fails and the proponent succeeds.

Whenever litigation exists somebody must go to court with it; the plaintiff is the first to begin; if he does nothing, he fails. If he makes a *prima facie* case and nothing is done to answer it, the defendant fails."

Principles on Evidence (2d Edition), Section 176.

appellee indulges in the false premise that when the Board of Special Inquiry found that appellant is the natural blood son of his father, Wong Yem, it found as a matter of law that appellant was attempting by fraud to enter the United States. We see nothing to

of fraud in the pleadings and answer. In findings of facts and conclusions of law of the Special Inquiry did not mention fraud as for its adverse decision.

We do not wish to burden the honorable Court with repetition of our arguments embodied in the brief. We believe the arguments and authorities submitted in that brief aptly cover our position and answer appellee's contentions.

Wherefore, appellant prays that the judgment of the District Court be reversed and that appellant be adjudged a citizen and national of the United States.

Dated, San Francisco, California,
October 22, 1951.

Respectfully submitted,

CHOW AND SING,

Attorneys for Appellant

No. 12,986

IN THE

United States Court of Appeals
For the Ninth Circuit

WING FOO,

Appellant,

WARD McGRATH, Attorney Gen-
eral of the United States,

Appellee.

APPELLEE'S PETITION FOR A REHEARING.

CHAUNCEY TRAMUTOLO,

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al De Novo'' is not a term having one invariable ing. Where, as here, it relates to the judicial re- of an issue already heard in an administrative pro- ng involving the same parties, before a tribunal orized by law to determine that issue, the term ies the re-examination and re-evaluation of the ence adduced at the prior proceeding, together a consideration of whatever new and additional ence is offered at the de novo hearing.....	2
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IN THE

United States Court of Appeals
For the Ninth Circuit

WING FOO,

Appellant,

WARD McGRATH, Attorney Gen-
eral of the United States,

Appellee.

APPELLEE'S PETITION FOR A REHEARING.

Honorable William Denman, Chief Judge, and
the Honorable Associate Judges of the United
States Court of Appeals for the Ninth Circuit:

OPENING STATEMENT.

Case poses a legal problem of considerable
importance to the United States and to the effective
operation of its immigration laws. The problem
concerns the scope and purport of Section 503 of the
Immigration Act of 1940 (8 U.S.C. 903) in its applica-
tion to a person seeking admission into the United
States for the first time, under claim of derivative

ceedings taken before the Immigration authorities prescribed by statute (8 U.S.C. 153). The decision herein may well have serious impact on the practical efficacy of the enforcement of the migration laws intended to safeguard against the entry of aliens into the United States without authority. Appellee is convinced that a more complete presentation of the case upon rehearing will satisfy the honorable Court that the ruling of the District Court allowing into evidence the official records of the proceedings before the Board of Special Inquiry in the investigation of appellant's citizenship claim, was not an error. For the foregoing reasons, hereinafter detailed, appellee respectfully requests a reversal of the ruling herein.

I.

"TRIAL DE NOVO" IS NOT A TERM HAVING ONE INDEFINITE MEANING. WHERE, AS HERE, IT RELATES TO A SPECIAL RE-TRIAL OF AN ISSUE ALREADY HEARD IN AN ADMINISTRATIVE PROCEEDING INVOLVING THE SAME PARTIES, BEFORE A TRIBUNAL AUTHORIZED BY STATUTE TO DETERMINE THAT ISSUE, THE TERM IMPLIES A RE-EXAMINATION AND RE-EVALUATION OF THE EVIDENCE ADDUCED AT THE PRIOR PROCEEDING, TOGETHER WITH A CONSIDERATION OF WHATEVER NEW AND ADDITIONAL EVIDENCE IS OFFERED AT THE DE NOVO HEARING.

Appellee finds no reported case arising under section 503 of the Nationality Act holding, in favor of, or brought thereunder by a foreign-born plaintiff, that a claim of citizenship and right of entry into the

and consider the contents of the record of the proceedings of that board, duly taken under the provisions of 8 U.S.C. Sec. 153. On the other hand, in *Yeow Tung v. Clark*, 83 F. Supp. 482, we find the court, trying *de novo* the issue of plaintiff's derivative citizenship in a suit filed under the Nationality Act, admitted into evidence various records of proceedings had before the department and agencies to determine that issue; and, where there was such a conflict between the evidence in those proceedings and testimony given at the trial, the court decided that plaintiff had failed to meet his burden of proof that he was a citizen. In *Ying Og v. Clark*, 81 Fed. Supp. 696 the court speaks with reference to Section 503 of the Nationality Act:

"It is clear that the statute contemplates a trial *de novo* of the issue of citizenship and not merely a review of the administrative action." (p. 697.)

The language above quoted does not indicate a bar to the court hearing the trial *de novo* is precluded from any consideration of the administrative action taken on the citizenship issue.

In *Grath v. Chung Young*, 188 F. (2d) 975 (9th Cir. 1950), it appears from the opinion of this court that the determination of nationality by the trial court in that action was based on the finding of the Special Inquiry, together with additional evidence offered at the trial.

Compensation Act of Montana. In *Wornconda Copper Mine Co.*, 43 P. (2d) 663, Supreme Court of that state held that that meant that

“all the evidence taken by the board, and additional evidence taken in the Court, may be considered together and that, upon the evidence as a whole, the Court should render judgment.”

The foregoing interpretation of the term “*de novo*” has been judicially accepted as correct in several other instances, to which we now refer to:

(a) An appeal in admiralty entitles the appellant to a trial *de novo*; yet the record of the court below is part of the evidence considered at the appellate hearing.

The Cricket, 71 Fed. (2d) 61 (C.A. 9),
2 C. J. p. 318, Sec. 187a.

(b) In the article “*Appeal and Error*”,
Juris, p. 726, Sec. 2647, it is stated:

“Under the old chancery practice and under the Code of Civil Procedure, cases of equity are tried *de novo* on appeal with the entire record and evidence.”

(c) Congress, by Act of 1888 (25 Stat. 474), granted to any Chinese person convicted by the United States Commissioner of being unlawfully within the United States in violation of the Exclusion Laws, the right to appeal his case

imately reached the United States Supreme Court following the taking of such an appeal. In *Ng Fung Ho v. White*, 276 U.S. 609, it appeared from the Supreme Court opinion that the record of the proceedings before the Commissioner was received in evidence by the District Court as part of the proof upon which the case was tried *de novo*; and this practice was, at least tacitly, approved by the Supreme Court. (*Liu Hop Fong v. United States*, 209 U.S. 453; *Ah How v. United States*, 193 U.S. 65; *Tom Hong v. United States*, 193 U.S. 193.)

In the leading case of *Ng Fung Ho v. White*, 276 U.S. 609, in commenting on the *judicial* nature of deportation proceedings under the Chinese Exclusion Act, the Supreme Court stated, at page 283: "The trial is commenced usually before a Commissioner of the District Court; but on an appeal to the District Court additional evidence may be introduced and the trial is *de novo*." (Italics supplied.)

This court held in *Carmichael v. Delaney*, 170 F.2d 239, (9th Cir. 1948) that a *resident* of the United States claiming citizenship, whose return to the country from abroad is prevented by an executive order determining him to be an alien, may, by proceeding in habeas corpus, obtain a *judicial* trial on the issue of his claim to citizenship. Yet, it is observed by this court that at such *judicial* trial, the record is not confined to other evidence received:

The record made before the Board of Special

(e) The court may take judicial notice of numerous instances in which Federal statutes providing for a judicial trial *de novo* of issues previously determined administratively, also expressly provide for the admission of the administrative record into evidence to be considered at the *de novo* trial.

The manner in which State Superior Court trials are conducted in California upon appeals from judgments rendered in Justice's Courts on questions of fact, offers no criterion for the manner in which trials contemplated by federal law that a trial *de novo* had under Section 503 of the Nationality Act. The issue of the citizenship of a foreign-born non-citizen after the same had been previously heard and determined in executive exclusion proceedings. Nothing, trial proceedings in California Justice's Courts are not officially reported and there is, consequently, no record available for appellate consideration. Furthermore, California Code of Civil Procedure Section 980a is so phrased as to require, in the opinion of the California Courts, the legal conclusion that the proceedings in the court below, on questions of fact, intended by statute not to be considered on appeal. Neither can any analogy favorable to appellate review be drawn from the manner in which a new trial is conducted when held before the same court or tribunal. In the latter case, the new trial results from some error which requires a complete vacation of the former proceedings.

de novo" in the instant case, or the reasons
authorities herein given which fully support that

II.

APPARENT THAT CONGRESS NEVER INTENDED BY SEC.
503 OF THE NATIONALITY ACT, TO PROVIDE FOR
JUDICIAL TRIAL DE NOVO OF A CLAIM TO CITIZEN-
SHIP ASSERTED THEREUNDER, WITHOUT REGARD FOR
THE FACTS PROVED AT PRIOR EXECUTIVE PROCEEDINGS
FULLY HELD TO DETERMINE THAT VERY ISSUE.

Years prior to the enactment of the National-
ity Act of 1940, Congress provided by statute for a
comprehensive procedure whereby foreign born per-
sons seeking entry into the United States under claim
to native citizenship, might have their claims
reviewed and determined by executive officials of the
Department. (Immigration Act of 1917, 8 U.S.C. 153.)
This has been long established by Supreme Court author-
ity. When a person, who has never resided in the
United States,

presented himself at its border for admission,
the mere fact that he claimed to be a citizen did
not entitle him under the Constitution to a
special hearing; and that unless it appeared that
Departmental officers to whom Congress had
entrusted the decision of his claim, had denied
him an opportunity to establish his citizenship,
or refused a fair hearing, or acted in some unlawful or
improper way or abused their discretion, *their*
action upon the question of citizenship was con-

Quon Poy v. Johnson, 273 U.S. 352, 353, citing *United States v. Sing Tuck*, 194 U.S. 155, 156; *United States v. Ju Toy*, 198 U.S. 253, 263; *Cheong v. United States*, 208 U.S. 8, 11; *Tang Tun* 223 U.S. 673, 675; *Ng Fung Ho v. White*, 276, 282.

This court has recently commented upon the wisdom of legislation committing to the final determination of executive officers of government, the exclusion of non-residents to derivative citizenship, and of referring such determination to judicial review with regard only to the fairness of the administrative hearing recorded. In *Carmichael v. Delaney*, supra, the court recognized the potential practical difficulties in the enforcement of the Chinese Exclusion Act, describing them as (p. 243, footnote 4) "difficulties which would be intensified if the members of the undesired race were held entitled to a trial more formal than an executive hearing."

In the face of the long established national policy and procedure governing the enforcement of the exclusion of aliens seeking to enter the United States unlawfully, and the reasons underlying that policy and procedure, it would be entirely inconsistent therewith now to ascribe to Section 503 of the Nationality Act of 1940, a meaning which might effectuate a complete negation of such policy and procedure, although the reasons therefor remain constant. Appellee submits, therefore, that

class to which appellant belongs, wherein, following a full and fair administrative hearing and final determination on the issue of his citizenship, he may litigate that issue without respect for the facts and findings reached at the administrative hearing. If we are to maintain the integrity of those administrative proceedings, which are conditioned upon any trial *de novo* under Section 503 of the Nationality Act,—for there can be no right of a judicial trial *de novo* hereunder, until there has been an administrative determination of citizenship,—the term “*trial de novo*” must be accorded the meaning which has been given it in the numerous instances hereinbefore specified. Otherwise, untenable consequences can be expected to result from which the instant case is an example. That is, a foreign born person claiming a right of citizenship by virtue of derivative citizenship, whose claim is recognized by law to be heard and determined by the immigration authorities, may, if his claim be denied, obtain a judicial trial *de novo* of the issue of citizenship, by filing a suit under Section 503 of the Nationality Act. Then at the trial *de novo* he may successfully exclude from the court’s examination all but a part of the record of the prior proceedings which contain evidence damaging to his claim, albeit to his own behalf. Thus he becomes enabled to use the administrative processes of this Government as a preliminary trial run of his claim, and he can assure himself of a more advantageous result at the judicial trial *de novo* of his citizenship.

It is little answer here that the witness Gong, was in San Francisco at the time of the physical presence there did not assure the government to produce him, or validate the plaintiffs' objection to the trial court's consideration of his testimony he himself introduced at the prior administrative proceedings.

The weight and credibility to attach to the testimony lies within the exclusive control of the judge, whose experience will qualify him to place it in proper context in relation to whatever additional evidence is offered *de novo*. Sitting in a court of equity, he should not be restricted in his consideration of this testimony, by the more technical rules of evidence which obtain in common law.

III.

APPELLANT'S AUTHORITIES DO NOT SUPPORT HIS POSITION THAT UPON A JUDICIAL TRIAL DE NOVO OF A MATTER PREVIOUSLY DETERMINED IN A PRIOR PROCEEDING BETWEEN THE SAME PARTIES, THE CERTIFIED RECORD OF THE PRIOR PROCEEDING IS INADMISSIBLE AS EVIDENCE THEREIN CONSIDERED BY THE COURT AT THE DE NOVO HEARING.

None of the cases cited in appellant's opening brief uphold the principle that a court trying *de novo* an issue previously determined in an administrative proceeding involving the same parties, is forbidden from the benefit of proof elicited at the prior proceeding. It is a part of the evidence upon which its judicial

no quotations cited on page 5 of appellant's brief, are from cases which merely rule that administrative hearings which do not have objective the determination of issues between have no probative value in a subsequent judgment thereof. An exclusion proceeding before the Board of Special Inquiry, acting under statutory authority of Title 8, U.S.C., Section 153, is for the express purpose of finally determining citizenship of persons presumptively alien.

Appellant's reply brief, p. 3-4, he cites the case *Pittsburg S.S. Co. v. Brown*, 171 Fed. (2d) 175. Appellant's present proper analysis and distinction, might not lend support to his position with respect to the nature of the trial *de novo* to which he was here entitled. Actually, the contrary is so. *Pittsburg S.S. Co. v. Brown* was a case factually similar to that presented to the Supreme Court in *Crowell v. Benson*, 382 U.S. 1, 22. Both cases involved the same legal issue, related to the admissibility in evidence of the results of an administrative proceeding, at a judicial trial *de novo* of certain of the matters determined in the administrative proceeding. The decision in *Pittsburg S.S. Co. v. Brown* followed that of *Crowell v. Benson*. We therefore turn to the latter case to demonstrate that appellant's authority, rather than supporting his position, actually substantiates that the Board of Special Inquiry is not a court. The Board's decision with respect to the meaning of trial *de novo* in a suit under Section 503 of the Nationality

Act. *Crowell v. Benson*, like *Pittsburg S.S. Brown*, involved a suit to enjoin the enforcement of a compensation award made under the Longshoremen's and Harbor Workers' Compensation Act. The Supreme Court there held that the trial court's finding *de novo* issues of fact upon which depended the jurisdiction of the Compensation Commission to make the award, was justified in refusing to receive as evidence the transcript of the testimony before the Deputy Commissioner relating to that particular issue. But each reason advanced for the holding reached in *Crowell v. Benson* accentuates the weakness of appellee's contention here as to the propriety of "trial *de novo*" in a suit under Section 30 of the Nationality Act. We therefore submit that the following analysis of *Crowell v. Benson*.

First, *Crowell v. Benson* held that the determination by the Compensation Commission of the facts necessary to sustain its own jurisdiction, need not have been accorded evidentiary weight in the trial before the United States District Court, since the trial *de novo* was for the very purpose of determining whether that jurisdiction actually existed. But at page 57, the court makes this qualification:

"In relation to the Federal government, we have already noted the inappropriateness to subject to a present inquiry of decisions with respect to questions of fact upon evidence and with the authority conferred, made by administrative agencies which have been created to ai-

performance of government functions and where the mode of determination is within the control of Congress." (Italics supplied.)

citizenship of a foreign born person, presumption, who seeks admission into the United States for the first time, is not a fact upon which the action of the Immigration and Naturalization Service to exclude aliens has been made to depend. The act which has been committed by law to the determination of that executive agency.

United States v. Ju Toy, 198 U.S. 253, 8 U.S.C. 153.

Section 503 of the Nationality Act has enlarged the scope of the court's power to review such a determination, it still remains the law that the determination of citizenship in the case above mentioned, is within the power of the Immigration and Naturalization Service to determine.

Finally: The rule of *Crowell v. Benson* is examined in its application to cases arising between private litigants. On page 50, the court states: "As to determinations of fact, the distinction is once apparent between cases of private right and those which arise between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." Thus Congress, in exercising the powers conferred to it, may establish 'legislative' courts to serve as special tribunals 'to examine

and determine various matters arising from the government and others, which from their nature do not require judicial determination yet are susceptible of it'. But 'the most determining matters of this class is committed within congressional control. Congress may reserve to itself the power to decide, may confer that power to executive officers, or may refer it to judicial tribunals.' "

Thirdly: *Crowell v. Benson* did not hold that the District Court was in that case *forbidden* from receiving in evidence the record before the Deputy Commissioner. It merely held that inasmuch as the case being tried *de novo* related to the jurisdiction of the Deputy Commissioner to hear and determine the matter before him, the court was "under no obligation to give weight to his proceeding pending the determination of that question." (p. 64.)

Finally: Justice Brandeis, dissenting from the majority opinion in *Crowell v. Benson*, expressed the view that the trial court should have been permitted to receive in evidence and consider the record before the Commission, stating, p. 85:

"Nothing in the Constitution, or in any previous decision of this court to which attention is here called, lends support to the doctrine that a judicial finding of any fact involved in a proceeding to enforce a pecuniary liability may not be made upon evidence introduced by a properly constituted administrative tri-

a determination so made may not be deemed independent judicial determination." (Italics relied.)

CONCLUSION.

ant makes no claim that he was not accorded
ess at the exclusion proceeding before the
Special Inquiry to determine his citizenship
r that the determination by that Board was
on substantial evidence. He seeks, however,
t an impotency to the entire exclusion pro-
and the resulting determination unfavorable
citizenship claim, by reading into the term
de novo", a meaning which could well succeed
g upon this government the difficult burden
oving a claimed father-son relationship al-
have its origin on foreign soil. And thus
e, a presumptive alien, successfully relieve
f the burden which at all times is legally his,
ishing by a preponderance of the evidence,
ed States citizenship; a burden which should
upon him full responsibility for explaining
cies in testimony of his own offering at the
ring.

ee respectfully submits that reason and law
ast any definition of "*trial de novo*" in pro-
under Section 503, which would deny to the
rt below the right to examine and weigh the
veloped at proceedings before the Board of

Special Inquiry, on the issue of appellant's
ship.

Dated, San Francisco, California,
March 24, 1952.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellee
petitioner in the above entitled cause and that in
support of the foregoing petition for a rehearing
presented in point of law as well as in fact and
that no petition for a rehearing is not interposed

San Francisco, California,

March 24, 1952.

ANTOINETTE E. MORGAN,

*Of Counsel for Appellee
and Petitioner.*

No. 12987

**United States Court of Appeals
for the Ninth Circuit**

CALIFORNIA ELECTRIC POWER COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

BRIEF FOR RESPONDENT

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1952.

FILED

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the United States Court of Appeals for the Ninth Circuit

No. 12987

CALIFORNIA ELECTRIC POWER COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

BRIEF FOR RESPONDENT

EXEMPTIONAL COUNTERSTATEMENT

In a proceeding under Section 313(b) of the Federal Power Act¹ to review an order of the Respondent Commission requiring the Petitioner Company to cease and desist from charging its two wholesale customers in Nevada any rate other than "filed rates." That is to say, from charging any rate other than the one embodied in the contract the Company had previously filed with the Commission for its sale to Mineral Wells Power System and the rate in the contract it should have filed for its sale to the Naval Ammunition Depot, Hawthorne, Nevada, under the terms of filing requirements which the Commission determined were applicable. The Commission expressly provided, however, that such "filed rates" should control only "until and unless * * * duly superceded by new rates filed by the Company or by rates fixed by

¹ 351; 16 U. S. C. § 8251(b). In lieu of printing as an appendix the numerous provisions of the Act which we cite, we are attaching the Clerk printed pamphlet copies of the Act for more convenience.

² Part 35; Federal Power Act §§ 205(c), 205(d), 20, 309. Rele-

counting requirements with respect to the excessive "filed rates" which had been collected by the Commission on certain rulings on admissibility of evidence; and denial to reopen the record (R. 110-112, 146-148). (R. 84-112) is reported in 89 PUR NS 359.⁴

Commission jurisdiction, insofar as here questioned, conferred by the provisions of the Federal Power Act, particularly Sections 205(c) and 205(d) for regulation of rates by "public utilities" in selling power at wholesale in interstate commerce; Section 20 of that Act providing for regulation of rates of licensees whose electric power enters interstate commerce, and adopting the procedure and practice of the Interstate Commerce Act in fixing and regulating rates; and Section 309, providing for issuance of orders, regulations necessary or appropriate to carry out provisions of the Act.

The Company does not controvert the jurisdiction of the Commission to conduct the proceeding, to decide the issues raised therein, and to issue an order accordingly. It claims that it is generally subject to regulation under the

³ Petitioner describes the order as requiring it to cease and desist from charging Mineral County rates other than the previously filed rates "or until such rates were superseded by order of F. P. C." and from charging Navy any rates other than those set forth in the last contract. The Commission found should have been filed, and which it directed the Company to file. Co. Br. 4; Petition, R. 624-625; see also Co. Br. 70. But the effect of the Commission's order (R. 110-112) left the Company at liberty, either immediately or at any later time, to file higher rates in 30 days (or earlier for good cause) subject only to the usual filing provisions generally applicable to all changes in filed rates. Sections 205(c) and 205(d), 18 C. F. R. § 35.3(c). The Commission had previously permitted rate schedule filings to become effective as of dates prior to the filing. *E. g.*, R. 604, 585, 589. The filing provisions of the Act and the Commission's order to those in the Interstate Commerce Act are discussed in *Northwestern Co. v. Montana-Dakota U. Co.*, 181 F. 2d 19 (C. A. 8), *affirmed*, 246, 251-252.

⁴ The order incorporates (R. 103) the Commission's opinion. The opinion (R. 95) refers to and reaffirms the conclusion previously stated in *Safe Harbor Water Power Corporation* (5 F. P. C. 221, 66 F. 2d 179, *affirmed*, 179 F. 2d 179 (C. A. 3), *certiorari denied*, 339 U. S. 411).

utility" within the special meaning of that term Part II (Co. Br. 6). Its objections run only to the Commission's decision that the rates in question are subject to Commission filing requirements, that the Company should file the rates which it had attempted to raise without complying with filing requirements, and that it charge only the rates so filed.

It also objects to Commission rulings on admissibility of evidence and on a motion to reopen the record.

In attempting a more detailed statement of the issues presented by the petition for review, some correction of the statements in Petitioner's brief and some augmentation of the record is desirable to show how the issues arose after the Commission had acquiesced in a long course of Commission action adverse to the Company's present contentions.

ADDITIONAL STATEMENT OF THE CASE

Administrative interpretation. For over 13 years the rates filed by the Company and its corporate predecessor in Mineral County were filed without questioning the validity of the Commission's filing requirements.⁵ The record herein shows that many of the Company's filings under its present or former name (see notice of change of name, filed 1936) were permitted by the Commission to become effective on dates prior to the dates upon which they were filed (see Nos. 5604, 585, 589). In those cases the Company (the predecessor corporation) did not, as it now suggests (Co. Br. 69),

wait until the filing took effect January 20, 1936 when the Commission's amendments implementing Sections 205(c) and 205(d) first became effective. The rates were filed by the Company's immediate corporate predecessor, The Sierra Power Company. The Company continued to file all new rates and amendments, at first under its then corporate name of The California Electric Corporation until it changed its name by amendment of incorporation in 1941, and thereafter under its present name (Nos. 5-615, 165-166, 404-412). The service rendered and the rate charged were defined in the contracts, and all F. P. C. filing requirements were complied with by filing the contracts—the usual practice under the Federal Power Act where a single or very few customers receive the same service. The rates were made in accordance with legal advice given the Company

initiated the new practice of expressly making its effective as of a date prior to the filing date, subjection of the Commission's filing requirements (R. 587, 408).⁷ In those cases the Commission did not disapprove the Company's filings, or abstain pending them, but affirmatively asserted its jurisdiction over them by issuing orders pursuant to the last sentence of 205(d) of the Act and Section 35.3(d) of its Rules (Section 35.3(d)), waiving the advance notice requirement and directing the rates to become effective as of the contract date.

Furthermore, in 1940, upon very similar jurisdictional grounds, the Commission had exercised authority over the Company under its then corporate name to regulate a rate charged by the City of Los Angeles, and the Company had acquiesced in the Commission's decision reducing that rate. *City of Los Angeles v. The Nevada-California Electric Corporation*, 104, 32 PUR NS 193.

Attempts to change rates without filing new schedule. When the Company on October 15, 1948, submitted its proposed rate applicable to Mineral County, representing a 10 percent increase (R. 241), the Commission by four orders and letters over a period of six months repeatedly required the submission of the additional data required by the rules necessary to permit a preliminary check of the justification for the increase (R. 88-89). At length the Company (which had previously been granted a corresponding increase in rates by the California Commission) on March 22, 1949, submitted its incomplete submittals, instead of furnishing the required data (R. 88-89). Shortly afterward the Company submitted its report for 1948, filed May 2, 1949 (Certified Transcription

⁶ For an example of that practice, see R. 610-615.

⁷ Those provisions, according to the Company's Vice President G. C. Delvaille, were included because the Company's "legal staff felt it was necessary at that time" (R. 376). A Company letter dated December 1, 1939 and signed by the same G. C. Delvaille explicitly states: "This schedule covers an agreement for an interstate sale at wholesale and resale between The Nevada-California Electric Corporation and

disclosed that it had received revenues from Mineral which could not be reconciled with the last completed g, and the Commission, under date of June 8, 1949, an explanation of the discrepancy (R. 579). Re- to answer, the Commission made a further request e of July 20, 1949 (R. 580).

ly (R. 565) signed by the Company's Vice President Delville under date of August 4, 1949, the Company at since August 1, 1948⁸ it had been charging and from Mineral County at a higher rate. The Com- her stated that it was billing the Navy at an increased that the Navy had refused to pay at the higher rate. Company continued to serve the Navy under a "letter of dated June 29, 1949, by which the Navy had under- pay "the old rates with the provision that, if a differ- ere thereafter agreed upon or fixed by any regulatory ng jurisdiction in the premises, such new rate should n October 1, 1948" (R. 566-568).

Company's letter went on to say that the Company be- t the service and rates were subject to regulation by ornia Commission⁹ "for the reason that all of the delivered to Mineral County Power System * * * ed in one or more projects licensed" by the Commis- Sections 19 and 20 of the Federal Power Act provide and service in such cases are to be fixed by State ons, if any, even though the energy enters into inter- merce." Also that transmission by both customers pt under Section 201(f) of the Act and hence the s sales to them were not in interstate commerce. It that the Company would "await a contrary order, if suse" (R. 568-569).

e was subsequently admitted to be erroneous, the correct date r 5, 1948 (R. 368).

earing Vice President Delville declared that he "would not y as to say that we were advised [by the Company's legal staff] c obligated" to file the Mineral County rate with the Federal mission (R. 379-380). Mr. Delville further testified that he

mental application to the California Commission for applying the "P-2" and "P-3" rate schedules to these a hearing was held by that Commission October (R. 151-152).

In December, following the California Commission's ruling on the supplemental application, Mineral County filed a letter to the Federal Power Commission complaining that it had been overcharged more than \$12,000, and that the overcharge was continuing at the rate of approximately \$1,000 a month. It sought refund of the excess and restoration of the filed schedule "until such time as permission to change the schedule has been authorized by the proper authority" (R. 537-538).

Commission proceedings. After correspondence with the California Commission, before which the Company's supplemental application then remained pending, the Federal Power Commission issued a "show cause" order¹⁰ initiating a proceeding to determine the applicability of its filing requirements to both the Mineral County and Navy rates (R. 1-10). The order also set a hearing to be held concurrently with the hearing of the hearing being held by the California Commission under a plan of cooperative procedure previously agreed to between the Power Commission and State Commission (R. C. F. R. § 1.37).

The order expressly provided that other interested parties and Commissions might participate, either by holding a concurrent hearing under the same plan, or as intervenors (R. 1-10). The Nevada Commission responded to notice of that show cause order, stating that it would not participate but would have a representative attend as an interested party only (R. 1-10) and it did so (R. 153-156, 183-184, 186-188).

In the Commission's proceeding appearances were made by counsel and briefs and reply briefs filed with the Commission.

¹⁰ A "show cause" order is provided by the Commission's rules for initiating a proceeding. 18 C. F. R. § 1.6(d).

¹¹ This recital of facts discloses the lack of foundation for the

, Mineral County, the California Commission, the staff of the Federal Power Commission, severally (R. 13-14). Exceptions to the Examiner's Decision with the Commission for Mineral County, the Navy, staff of the Federal Power Commission, severally (R. 13). Applications for rehearing were filed with the Commission by the Company and the California Commission (R. 132) and denied (R. 146). Only the Company petitioned for Court review (R. 623), and the 60-day period in which a petition could be filed by the California Commission expired.

Restatement of the questions presented. We would restate the questions presented as follows:

1. With respect to Commission jurisdiction over these rates under Part II of the Act (relating to regulation of "sales at wholesale" "in interstate commerce" made by "public utilities")—

a. Do the rates of the Company, which is a "public utility," impliedly constitute a license from rate filing requirements under

Section 201(f) notwithstanding the exemption of the purchasers?

b. Do these sales "sales at wholesale" under Part II?

c. Do these sales excepted by the Section 201(b) exemption constitute "used in local distribution"?

d. With respect to Commission jurisdiction under Part I of the Act (relating to licenses)—

e. Does the power here "enter into interstate commerce" have the meaning of Section 20, and is that Section applicable to the exclusion of Section 19?

f. Can the Commission properly find the lack of qualified applicants a prerequisite to Commission regulation under Section 20?

g. Does the termination of the contracts bar the Commission from ordering the rates, therein set forth and not changed, to be adhered to, or to be filed where not

In view of the number of questions which we the Argument it seems desirable that this Summary be selective rather than comprehensive. So also, the large number of cases we rely upon impels us here to omit duplications thereto for the most part. We shall merely convey an impression of the trend of our argument, rather than to define its scope.

I

None of the Company's four objections to Commission jurisdiction under Part II to require filing of rates for itself discloses any error.

A. As an admitted "public utility" subject as such to regulation under Part II of the Act, the Company is not exempt from rate regulation under that Part, by reason of its status as a licensee under Part I. Directly in point are *Southwestern W. P. Corp. v. F. P. C.* (179 F. 2d 179 (C. A. 3, 1950), *denied*, 339 U. S. 957) and *Pennsylvania W. & P. Co. v. F. P. C.* (— F. 2d —, C. A. D. C. Nos. 10,236, 10,239, 10,531, 1951, July 3, 1951, *certiorari granted*, February 4, 1952), which hold that Commission regulation of rates of licensee—"public utility"—over objections that licensees are wholly exempt from Part II regulation. The grounds of those decisions are fully applicable to the narrower claim of exemption.

B. The Section 201(f) exemption "from the provisions of Part II" of the Act of the Company's two publicly owned purchases does not extend to exempt the privately owned Company's sales to them. Petitioner's theory that the purchase of energy out of state becomes nonexistent if the energy is sold in state under Section 201(f) is contrary to the uncontroverted evidence that one cannot exist without the other, and contrary to Section 201(c) of the Act which provides that "energy shall be transmitted in interstate commerce if transmitted from one state and consumed at any point outside thereof." The Commission's regard to who owns or operates the facilities

ship by which two definitions of the Act tacked to
literally exempt sales to these purchasers (the Navy
agency) was not intended by Congress to have
effect. It should not be given that effect because that
would thwart a clearly defined major purpose of the Act. The
course of administrative interpretation is opposed
to exemption and an argument based on the same literal
construction of the Act has been overruled *sub silentio* by the Su-
preme Court. *Connecticut L. & P. Co. v. F. P. C.*, 324 U. S. 515.
The sale to the Navy is not removed from Commission juris-
diction under the plain terms of the Act and applicable de-
termining the circumstances under which the resales are made;
in fact that a larger part of the energy is not resold, the
fact making it clear that the Commission's jurisdiction is not
limited "upon any particular volume or proportion" (*Con-
necticut L. & P. Co. v. F. P. C.*, 324 U. S. 515, 535-536); or by
the fact that the Company does not contract for or intend the
resale to be made (*Jersey Central P. & L. Co. v. F. P. C.*, 319
U. S. 68-73).

These two Company sales are not withdrawn from Com-
mission regulatory jurisdiction by the Section 201(b) exception
for sales "used in local distribution." They are indistin-
guishable from the sale held constitutionally beyond state rate
regulatory jurisdiction in *P. U. C. v. Attleboro S. & E. Co.* (273

The rate regulatory provisions of Part II were en-
acted to fill that gap in electric utility regulation. Transmis-
sion by the Company over distances up to 80 miles, and 50
miles by the purchasers, from isolated hydroelectric
plants in remote communities, cannot properly be held to be
"local distribution" (*F. P. C. v. East Ohio Gas Co.*, 338 U. S.
127-170).

II

The Company's objections to Commission jurisdiction under
the Act are equally without merit. That the electric power is
transported interstate commerce where taken across the state bound-

Section 20 was intended to apply to all sales in interstate commerce to the exclusion of Section 19, as shown by its language. It is not clear whether Congress in Section 20 intended to authorize state regulation of licensee's rates in interstate commerce by interstate compact where such rates lie outside the constitutional power of the states under the Commerce Clause. But in any event there are two threshold requirements for regulation of rates under the terms of Section 20: (1) The Commission provides its own standard of lawful rates which must be enforced by an agency provided for that purpose by the state. (2) Enforcement must be the result of agreement between the properly constituted authority of each state. Here there is no agency properly constituted by one of the states to enforce the Commission's regulation. Hence, the prerequisite to Commission regulation under the terms of that Section is clearly met. III

The Commission's order merely directs the Company not to charge any other rate than its last legally filed, unchanged rate for its sale to Mineral County, which it may legally charge in any event. The Company has no rate as a legal right other than the filed rate. See *Montana-Dakota U. Co. v. Northwestern P. S. Co.*, 246 U.S. 246, 251. For the sale to the Navy, for which no rate has been filed, the order merely directed filing of the rate actually being paid, defined in the contract claim which has been terminated. The Company, by unsuccessfully attempting to collect a higher rate without complying with the filing requirements, could not entitle itself to the higher rate. Cf., *Armour Packing Co. v. United States*, 209 U.S. 95. The Company counsel recognize that there is here no question of the fairness of the rate.

IV

From the nature of the evidence involved in the Commission rulings it is clear that the rulings could not have been prejudicial and could not invalidate the Commission's order under Section 308(b).

ARGUMENTS ADVANCED TO AVOID COMMISSION FILING REQUIREMENTS UNDER PART II DISCLOSE ERROR BY THE COMMISSION

Of the four claims advanced by the Company to avoid filing with the Commission filing requirements under Part II of the Act has been considered and rejected by the Commission in previous cases, and by the appellate courts where presented before them. None of those claims or the Company's legal arguments will be found to disclose any error in the Commission's decision here under review or any reason for reversing the prior decisions.

Company Is Not Impliedly Exempt as a Licensee From Rate Filing Requirements Under Part II

Arguing that it is both a licensee under Part I of the Act (Sections 7-8) and a "public utility" subject to regulation under Part II "as to certain activities, such as accounting and issue of securities, sale of property, etc." (Co. Br. 6), the Company devotes a large part of its argument (Co. Br. 44-48) to the contention that nevertheless, as a licensee, it is subject to regulation under Part II with respect to these activities (Co. Br. 33, 42). The Company sums up what it wants (Co. Br. 44-45): "Licensees simply form a class to which neither engaged in intrastate or interstate commerce or Sections 19 and 20 of the Act apply. The rate regulatory provisions of Sections 205 and 206 of Part II apply to others and not to licensees."

"Public Utility" Is Not Exempt From All Regulation Under Part II Where It Is Also a Licensee

The Company's present admission that it is subject to some regulation as a "public utility" under Part II reflects a narrower claim than has previously been considered by the

claims of complete exemption of licensees from all regulation. *Safe Harbor W. P. Corp. v. F. P. C.*, 179 (C. A. 3), *certiorari denied*, 339 U. S. 957; *Pennsylvania P. Co. v. F. P. C.*, — F. 2d — (C. A. D. C. No. 10,239, 10,531), decided July 3, 1951, *certiorari granted* February 4, 1952. We think it will be simpler for us to reject the Company's claim by first briefly reviewing the reasons the broader claims were denied, and second, showing that the reasons apply as well to the present claim for exemption from Sections 205 and 206 of that Part.

The *Safe Harbor* case, *supra*, was a proceeding to set aside a Commission order reducing Safe Harbor's rates by so much as \$100,000 annually. The Safe Harbor Company, a licensee of the Commission, was within the Part II definition of "public utility," claiming that it was to be subject to any regulation under Part II as a "public utility" because it said that as a licensee it was subject to regulation under Part I and entitled to have its rates, among other things, for its activities, regulated under Sections 19 and 20 of Part II. Under those Sections, it argued, the reasonableness of its rates should be tested by a different standard (fair return on an undepreciated investment rate base) from that which the Commission had used under a judicially approved interpretation of Part II (fair return on a depreciated investment rate base). As a licensee it had a vested right to have its rates regulated under the Part I standard. Safe Harbor also contended, as the Company does here, that it was entitled to State regulation of its rates under Sections 19 and 20, because the Commission erred in finding that the states directly concerned were not likely to agree."

The Third Circuit overruled both of Safe Harbor's contentions and held the Commission's rate order to be valid. As to the Commission's jurisdiction under both Parts I and II, in rejecting the Company's first claim, the Court held that the conflict was a substantive conflict between Parts I and II because the provisions of Part I prescribed no different standard for the regulation of rates than that prescribed by Part II (179 F. 2d at

on 20 and consequently that the Commission had
n. It added (179 F. 2d at p. 185, note 10):

* * certain portions of Parts I and II are incon-
sistent with each other unless we, or some other court,
make a rational reconciliation as we think we have done.
The provisions of the respective Acts cannot be recon-
ciled then the former must be deemed to be repealed
by the latter. Cf. our earlier opinion, 124 F. 2d at
pages 803-804.

For certiorari based on the same two contentions was
granted by the Supreme Court (339 U. S. 957).

In the *Penn Water* case, *supra*, another licensee—"public
utility"—again advanced the same two contentions in seeking
to set aside Commission orders under both Parts I and II re-
sulting in rates by approximately \$2,000,000 annually. In
1952 the Court of Appeals for the District of Columbia
also overruled both contentions. That Court went
on to affirm the Third Circuit; it noted as to the first conten-
tion that the Third Circuit had pointed out the essential same-
ness of the rate base requirements of Parts I and II (slip
sheet, pp. 10-11), and went on to hold that the provisions
of Part I do not require reading "an implied
exception for licensees into Part II" (slip sheet, p. 9). A brief
statement of its reasons should be of help in the present proceed-
ing. The question discussed in the next section of this brief,
whether an exception should be implied for licensees from
the general provisions of Sections 205 and 206.

Express terms expressly apply. The opinion of the Court
for the District of Columbia Circuit starts with
the statement that the express language of Part II contains no ex-
ception with respect to licensees. It points out that the con-
sideration of licensees from among the express
provisions in Section 201(f) tends to negative an implied
exception (slip sheet, p. 9):

It seems unlikely that Congress would not have in-
cluded so important a group as federal waterpower

to point out (slip sheet, p. 9) that the only judicial in point, the two *Safe Harbor* cases in the Third Circuit, opposed to any such exception of licensees, and that in the two other cases upon which the Penn Water relied did not involve Part II or discuss the possible conflict between Parts I and II.

Legislative history shows applicability. The opinion continues (slip sheet, p. 9) by showing that legislative history of Part II also supports application of Part II to licensees. It refers to the fact that the House Committee Report on the bill stated that licensees would be included among electric utilities."

Exception would create nonuniformity. Finally, the opinion points out (slip sheet, p. 10) that when Congress decided to provide a new system of federal regulation of interstate commerce in electric energy, application of the new system to nonlicensees alone would have resulted in nonuniformity: different treatment of licensees and nonlicensees in the same kinds of transactions. Congress, the Court says, therefore made the new system of federal regulation apply to licensees as well as nonlicensees and to that extent superseded any conflicting provisions for state regulation of electric utilities. Part I which, in the absence of any general scheme of federal regulation of electric utilities in 1920, had placed primary emphasis upon state regulation in order to make treatment of electric utilities as much like that of ordinary public service companies as possible.

Resolution of conflict not necessary where the majority has correctly found "unable to agree." Independently of the foregoing considerations, the Court reviewed and upheld the Commission's determination that Section 20 itself gave the Commission jurisdiction inasmuch as the states were unable to agree (slip sheet, p. 11), as the Third Circuit had held in the *Safe Harbor* case, *supra*.

mit that the principles upon which the *Safe Harbor Water* cases were decided are sound and require re-
the Company's present narrower claim of exemption
ions 205 and 206.

205(a) expressly applies to "All rates and charges
by any public utility for * * * sale of elec-
y subject to the jurisdiction of the Commission."

206(a) expressly applies to "any rate (or) charge
by any public utility for any * * * sale subject
isdiction of the Commission." Other subsections of

05 are similarly phrased. Thus these Sections are
made applicable in the same terms as the entire Part
apply to every "public utility," a term which, by

201(e) is expressly given the same constant meaning
d in this Part or the Part next following." In fixing
ing "sale subject to the jurisdiction of the Commis-

ed with the same meaning as in Sections 205 and 206,
Section 201(b) which provides that "The provisions
t shall apply to the * * * sale of electric energy

le in interstate commerce (etc.)." "Sale of electric
wholesale" is also given the same constant meaning
ed in this Part" (Section 201(c)). Subsection (f)

Section 201 provides express exceptions which also
ne for all of Part II: "No provision of this *Part* shall
(etc.)." (The enumeration which follows does not

ensees.)¹²
ch as the key terms defining the applicability of Sec-
nd 206 are the key terms determining the scope of all

and have the same constant meaning throughout that
at the District of Columbia Court of Appeals found
ress terms of Part II, in prior judicial utterances, and

ve history is equally pertinent here.
is what that Court said as to the purpose of Con-
providing a new system of Federal regulation, to make

by all "public utilities," whether or not licensees. Particularly pertinent in the present case. For these rates are appropriately regulable by the Commission as they were charged by a company which was not a licensee but derived all of its energy by steam plants. Moreover, if electric utilities are subject to *security* regulation under Section 20, as the Company admits (Co. Br. 6), it seems inconsistent with any concept of uniformity to say that they are not subject to *rate* regulation under Sections 205 and 206. The same provision is made for state regulation of both interstate rates under Sections 19 and 20.

If the Court upholds our present contention, it should uphold the Commission's jurisdiction to issue the order, regardless of whether or what it decides about the Commission's jurisdiction under Part I. If we are correct in the contention made below (pp. 32-40) that the Commission, rather than the States, had jurisdiction under Section 20, this Court should uphold the order on that ground, regardless of whether it upholds our present contention, or leaves the question undecided. And this we think more appropriate, the Court may uphold the Commission's jurisdiction on both legs.

B. These Sales Are "In Interstate Commerce" Notwithstanding the Section 201(f) Exemption of the Purchaser

In adopting many of the arguments heretofore made by companies seeking to avoid Commission regulation under the terms of Part II (Co. Br. 58-67) the Company introduced the argument, recently presented to this Court in *F. P. C. v. Edison Co.*,¹³ that inasmuch as the energy crosses the Nevada boundary on facilities owned and operated by the state-owned agencies exempted by Section 201(f), that the two-state journey of the energy must be treated as interstate in its entirety, and the remainder treated in and of itself as if it were *intrastate* (Co. Br. 61-64).

We shall not attempt to pursue the logical dilemma created by the Company's attempt to treat its own trans-

on of the same thing as nonexistent; in the case of
controverted evidence in the record that one could not
without the other (R. 304, 307-309). But assuming,
p, that this logical impasse could be surmounted, the
y's argument is based on a clear misreading of Section
That Section provides that no provision of Part II
*apply to the enumerated public agencies.*¹⁴ It cannot,
doing violence to its express terms, be "interpreted" as
t read, *apply to activities* of the public agencies, mak-
transactions nonexistent for the purpose of determin-
applicability of Part II to others who are not publicly

Moreover, the argument overlooks the clearly applicable
Section 201(c) that "electric energy shall be held to
mitted in interstate commerce if transmitted from a
d consumed at any point outside thereof." By this
nd unequivocal definition, written into the same Sec-
a subsection 201(f), Congress has made transmission
tate commerce wholly independent of the ownership
ilities by which it is accomplished.¹⁵

Senate hearings on the bill which subsequently became Part II,
nce to Section 201(f) by Mr. DeVane, then Solicitor of the
n, and one of the draftsmen of the bill, confirms the intention
the public agencies, not to create "a negative domain so far as
concerned and an activity of which no notice is taken" (Co. Br.
DeVane stated (Senate Hearings on S. 1725, 74th Cong., 1st Sess.,

ANE. We did not feel that it was within our province to prepare
would undertake to regulate municipal, State, or Government

as all governmental projects are concerned, our approach to the
s that in the legislation creating those authorities and giving
priorities their powers, this Congress had provided the power that
those agencies to have, and it did not seem to us that it was
attempt to bring those other governmental agencies under the
of the Federal Power Commission; so that in our preparation
we have left them out, and they are outside the pale of this bill.

BARKLEY. On the theory that it is not necessary for the Govern-
regulate itself?

ANE. That is right."

company (Co. Br. 64) relies on *Idaho Power Co. v. F. P. C.*, 189

At the time of the enactment of the Federal Power Act of 1935, although sales of electric energy or natural gas in one state, transmitted or transported into another, consumed, had been held subject to state regulation, sales were made *by* a local distributor to ultimate consumers (*Pennsylvania Gas Co. v. P. S. C.*, 252 U. S. 23; *P. S. C. v. Landon*, 249 U. S. 236), they had been held constitutionally exempt from state regulation when made *to* such a local distributor (*Missouri v. Kansas Gas Co.*, 265 U. S. 298; *P. S. C. v. Attleboro S. & E. Co.*, 273 U. S. 83). To fill the resulting gap in electric utility regulation Congress, following the demarcation which seemed indicated by those cases, enacted federal regulation for sales in interstate commerce but not for sales at retail in local distribution.¹⁶

regulatory action by F. P. C." If the *Idaho Power* case stood for its proposition, it still would fall short of supporting the argument that the Company must make to prevail on this point, *i. e.*, that the activities of public agencies are activities "of which no notice is taken" (C. 10, that is, are legally nonexistent—for the purpose of determining whether a privately owned "public utility" is subject to Part II regulation. But the *Idaho Power* case does not even stand for what the Company says, but for this: that under Section 201(b) Idaho Power Company could not be compelled to "wheel" power on the application of the United States under 201(f); hence, that it cannot be compelled to "wheel" for the United States by a license condition under Section 10(g) because that Section does not impose conditions "not inconsistent with the provisions of this Act."

It may be added that the Commission deems the decision of the Supreme Court erroneous and has petitioned the Supreme Court for a writ of certiorari. The petition has not been passed on at the time this brief goes to press.

¹⁶ The Senate Committee Report (S. Rep. No. 621, 74th Cong. 1st Sess., p. 48) states the matter as follows: "Subsection (b) defines the scope of this part of the act and the jurisdiction of the Commission. It applies to the transmission of electric energy in interstate commerce and the sale of energy at wholesale in interstate commerce * * * but does not apply to the retail sale of any energy in local distribution. Subsection (c) leaves to the States the authority to fix local rates of return where the energy is brought in from another State. In *Pennsylvania Gas Co. v. Public Service Commission* (252 U. S. 23), the Supreme Court held that such rates may be regulated by the States in the absence of federal legislation. The present bill carefully refrains from asserting

the clearly defined area thus excluded by Congress
mission regulation so as to exclude these sales from
ion jurisdiction without regard to the fact they are
he kind of sales Congress intended to regulate because
ionally beyond state regulatory jurisdiction under the
ferred to. But that these sales are basically indis-
ble from the sale held constitutionally exempt from
ulation in the *Attleboro* case is tacitly conceded by the
v. For in its sole effort to avoid that case (Co. Br.
he Company relies on its argument that licensees are
from Sections 205 and 206 *because Congress in the*
of its powers over public lands had provided for state
n of their rates under Part I. Its distinction is that
which was there involved was not a sale subject to
Congressional provision for state regulation, thereby
onceding that in the absence of such Congressional
, these sales, like that in the *Attleboro* case, are the
stitutionally not subject to state regulation. (We
where, *supra*, pp. 11-16, *infra*, pp. 32-40, that by Sec-
these sales were subjected to Federal, not state regu-
ence, even this attempted distinction fails.)

Utilities Commission v. Attleboro Steam & Electric Co. (273 U. S.
beyond the reach of the States. Jurisdiction is asserted also
terstate transmission lines whether or not there is sale of the
ried by those lines * * *. Facilities used only for intrastate
or local distribution are expressly excluded from the operation

se Committee Report (H. Rep. No. 1318, 74th Cong., 1st Sess.,
ates: "The new parts are designed to meet the situation which
reated by the recent rapid growth of electric utilities along in-
es. The percentage of electric energy generated in the United
was transmitted across State lines increased from 10.7 in 1928
933. The amount of energy transmitted in interstate commerce
s greater than all of the energy generated in the country in 1913.
decision of the Supreme Court of the United States in *Public*
ommission v. Attleboro Steam & E. Co. (273 U. S. 83), the rates
interstate wholesale transactions may not be regulated by the
rt II gives the Federal Power Commission jurisdiction to regulate
A 'wholesale' transaction is defined to mean the sale of electric
resale and the Commission is given no jurisdiction over local

other grounds is compelled by the absence of any facts it could be distinguished. Clearly the fact that delivery of these sales is made at a point located 18 to 25 miles from the state boundary is crossed (R. 321, 292), instead of the boundary, will not suffice. The courts have consistently reached the same results regardless of where title changes from sale to sale¹⁷ and transmission¹⁸ in the state of production to the state boundary,¹⁹ and as to transmission²⁰ and sale in the state of consumption after the state boundary has been crossed.

The sales here are, therefore, precisely within the contemplation of Congress in enacting Part II and the only questions considered are whether the quirk of statutory draftsman or the particular factual circumstances of the Navy's sales relied upon by the Company, stand in the way of accomplishing that purpose.

1. The Literal Definitions of the Statute Were Properly Treated by the Commission As Not Excluding These Sales

Reviving an argument which had been consistently rejected by the Commission in previous cases²² and overruled *silentio* by the Supreme Court,²³ the Company, before the Commission and in this Court (Co. Br. 59-61), tacks the definition of "sale at wholesale" in Part II (Section 201(d)), "to any person for resale," to the definition of "person" in Part I, as excluding the United States and a county agency (Sections 3(4), 3(3), 3(7)), with the literal re-

¹⁷ *Interstate Natural Gas Co. v. F. P. C.*, 331 U. S. 682, 687-688; *E. L. Co. v. F. P. C.*, 131 F. 2d 953, 958 (C. A. 2), *certiorari denied*, 319 U. S. 741; *Peoples Natural Gas Co. v. F. P. C.*, 127 F. 2d 153, 155 (C. A. 2).

¹⁸ *Jersey Central P. & L. Co. v. F. P. C.*, 319 U. S. 61, 69.

¹⁹ *P. U. C. v. Attleboro S. & E. Co.*, 273 U. S. 83; *F. P. C. v. Hawaiian Gas Co.*, 320 U. S. 591, 594.

²⁰ *F. P. C. v. East Ohio Gas Co.*, 338 U. S. 464.

²¹ *Illinois Gas Co. v. Public Service Co.*, 314 U. S. 498; *Colorado Gas Co. v. F. P. C.*, 324 U. S. 626, 630-631.

²² *Otter Tail Power Company*, 2 F. P. C. 134, 136-140, 33 PUR. 269; *Connecticut Light & Power Company*, 3 F. P. C. 132, 144, 40 PUR. 170, 178-179; *Otter Tail Power Company*, 8 F. P. C. 393; See also *Los Angeles v. The Nevada-California Electric Corp.*, 2 F. P. C. 134, 136-140, 33 PUR. 269.

of the legislative history of these definitions will show that the literal result is a quirk of draftsmanship utterly unnecessary while a consideration of the policy of the legislation will make plain that this is, as the Commission has held, a proper case for following the purpose of the statute rather than the literal words. *United States v. American Trucking Associations*, 310 U. S. 534, 543, and cases cited; *United States v. Rosenblum Truck Lines*, 315 U. S. 50, 55. In these circumstances, the course of consistent interpretation of the Act by the agency charged with its administration is of great weight. *Norwegian Nitrogen Co. v. United States*, 294 U. S. 294; *United States v. American Trucking Association*, 310 U. S. 534, 549; see Gellhorn, *Administrative Law* (2d Ed., 1947), p. 204.

The introduction into the definition of "wholesale sales" of the word "person," which had an artificially restricted definition in section 3 of Part I, had no purpose in itself but was merely incident to a rephrasing which cured an obvious defect in another aspect of the previous wording. Under the previous wording, the definition of wholesale sale did not use the word "person."²⁴ That word first made its appearance in the report submitted by the House Committee. But the House report, in commenting on the changed definition in the bill, merely stated that "A wholesale transaction is defined as the sale of electric energy for resale * * *" (H. Rep. No. 1318, 74th Cong., 1st Sess., p. 8), not using the word "person."

Furthermore, the report expressed no purpose that municipalities were to be exempted. This is significant where an exemption was intended, the report expressly

the definition (slipped into the bill by amendment from the Senate) (Cong. Rec. 8858) provided that "Electric energy shall be held to be sold at wholesale in interstate commerce within the meaning of this Act when it is sold for resale after its transmission in interstate commerce before such transmission if the same is thereafter so transmitted." This provision contained a "joker." It covered wholesale sales before interstate transmission, but omitted sales made in the course of interstate transmission, and would have made the Act inapplicable to the very

intended to broaden the Senate definition which it lends additional support to the view that "person" 201(d) was not intended in the artificially restricted of Section 3.²⁶

When we turn to the legislative history of the definition in Section 3 of Part I, which literally fix the meaning of it is likewise plain that there was no Congressional intent thereby to exempt sales of the kind here involved.

Section 3(4) defines person as "an individual or corporation which would, literally, eliminate the Navy."²⁷ Further, Section 3(3) in defining "corporation" expressly excludes from a "municipality" which is defined in Section 3 to include a county or agency of a state competent under the authority thereof to carry on the business of transmitting or generating power—hence literally excluding Mineral County.

This definition of "person" was added to Section 3 in the original draft of the 1935 amendments, along with the definition of certain other terms. It, therefore, could not have been intended originally to affect the meaning of "wholesale sale" which, as we have seen, was not defined in language until the term "person" until later. The "usefulness" of the addition was said in the Committee Report to be "obvious" and no further explanation was given.

It seems only reasonable to conclude that when the definition of "wholesale sale" in Section 201(d) was rewritten in the House, the word "person" was used without awareness of the draftsmen of the artificially restricted meaning which was given that word in the original bill.

²⁵ Thus, immediately following the restatement of the definition of wholesale sale, the report added (*ibid.*) "and the Commission is given jurisdiction over local rates even where the electric energy moves in interstate commerce."

²⁶ The Conference Committee adopted the House definition of person in the amendment. H. Rep. No. 1903, 74th Cong., 1st Sess.

²⁷ See the portions of our brief in *United States v. F. P. C.*, 303 U.S. 1 (C. A. 4) Nos. 6273, 6274, decided October 1, 1951, quoted in the brief in this case (pp. 59-61).

²⁸ Sen. Rep. No. 621, 74th Cong., 1st Sess., p. 42. A similar

tion to provide the exemption claimed by the Commission from the influence of the legislative history as to a consideration of the policy of the Act as a whole, it is at such an exemption would thwart the over-all purpose of the legislation.

The Commission stated in *Otter Tail Power Company* (307 U. S. 134, 137, 33 PUR NS 257, 260) it would mean that the Commission may not discriminate in rates charged private persons and municipalities, but is at complete and unfettered liberty to make distinctions in the rankest discrimination as between municipalities and between private customers and municipalities, receiving the same service." It is hardly likely that Congress intended to deprive consumers served by the thousands of privately owned distribution systems, of the protection afforded by the Act, from unjust and unreasonable interstate rates. The result would be completely at variance with the basic purpose of the rate provisions of the Act, which were designed to "fill the gap" in rate regulation disclosed by *P. U. C. v. Louisville & E. Co.* (273 U. S. 83). See *Jersey Central P. & E. Co. v. F. P. C.*, 319 U. S. 61, 67-68, 71, 80-81.²⁹ With these facts before them, even critics of the proposed legislation were in error.³⁰

Moreover, to adopt the Company's contention would fail to have any substantial effect to other provisions of the Act, *e. g.*, Section 106, allowing a municipality to file a complaint on the ground that "anything done or omitted to be done by any licensee of the Commission in contravention of the provisions of this Act," or Section 313(a), permitting review of Commission orders.

Initially it might appear that "filling the gap" on sales to municipalities would be a futile thing with respect to the energy resold by municipalities at wholesale, since that resale is exempted from the Act. Such resales were recognized to be of rare occurrence; and in any event, they are for purposes of private profit, so as to fall within the normal scope of the rate regulation. Hearings, House Committee on Interstate and Foreign Commerce, on H. R. 5423, 74th Cong., 1st Sess., pp. 569, 570, 2061-2062; Senate Committee on Interstate Commerce, on S. 1725, 74th Cong., 1st Sess., p. 256.

Hearings, House Committee on Interstate and Foreign Commerce, on H. R. 5423, 74th Cong., 1st Sess., pp. 647-48, 851, 1050, 1068, 1560, 61, 1612.

mission further observed in *Otter Tail Power Company* (p. 23) "Since the most serious, if not the only real a municipality could have against a public utility would be the rates charged it for electric energy at wholesale (the Commission has no power to regulate the retail rates of a public utility), it is most persuasive Congress intended that the Commission exercise its jurisdiction over such wholesale rates."

We may conclude this point by calling attention again to the *Connecticut L. & P. Co.* case (*supra*, p. 20, n. 23). In that case the Connecticut L. & P. Co. had made a similar objection to the Commission's order there in regard to its view. In reply the Commission's brief advanced many of the same considerations we have set forth herein.³¹ The Supreme Court, while setting aside the Commission's order in part and remanding the matter to the Commission for further proceedings consistent with its opinion, significantly did not say that the Commission was in error as to its jurisdiction over rates to municipalities (324 U. S. 515, 536), thus overruling *silentio* the same argument advanced by the Company.

2. The Particular Circumstances of the Navy's Resale Were Not Treated by the Commission as Not Excluding the Sale to the Public

The Company contends (Co. Br. 64-67) that the Navy's resale is not "for resale" within the definition of "resale" in Section 201(d) because (a) the Navy resells the energy at a rate, principally to Navy personnel, civilian employees, and concessionaires at a housing development located on the reservation; (b) only 25 percent of the amount sold to the Navy by the Company was delivered to those customers; and (c) the Company's former contract with the Navy made no provision for resale by the Navy and the Company does not intend to resell for resale. Here again the Company's objections will be found to lack substance.

a. The Navy Makes "Resales" of Energy Sold to It by the Company

Regardless of who the Navy's purchasers are, why they are served by the Navy, and how the Navy's rates to them are determined, the Navy's resale of energy to its personnel, civilian employees, and concessionaires at a housing development located on the reservation is a resale within the meaning of Section 201(d).

...they are regulated by any other agency, on the re-
whole the Commission was clearly warranted in finding
...energy "is resold to ultimate consumers and consumed
...ada" (R. 107). The responsible civilian official and
...officer testified to such resales (R. 270-279, 288-291,
...), testified that they were metered deliveries made
...written contracts, typical examples of which were pro-
...s exhibits and made part of the record (R. 541-552), at
...1½ cents per kwhr.³² Typical examples of the receipts
...r payment were also produced as exhibits and made part
...record (R. 553-554). That these are "sales" as much
...made by the usual local electric utility appeared fur-
...m the testimony that the only reason the service
...rendered by the local electric utility (Mineral County)
...latter's financial inability to undertake the business
...293). All of this evidence was uncontroverted.
...Company's argument (Co. Br. 65-66) that the purpose
...II was limited to enabling "State agencies to start with
...wholesale rate in regulating the local distribution rate"
...t II should, accordingly, be held inapplicable because
...y's local distribution rate is not regulated by a state
...is not supported by any citation of authority. Ob-
...the Company has cut its coat to fit its cloth. The
...on is in conflict with the Commission's consistent in-
...tion of the rate regulatory provisions as being intended
...benefit of consumers, including those served by municipi-
...tributing utilities, which are usually not regulated by
...encies (*supra*, pp. 20-24). It also ignores the fact that
...me of the enactment of Part II in 1935, even privately
...ocal distributing utilities' rates were not subject to
...on by state agencies in seven states,³³ yet it would

...verage monthly consumption by tenants in the Babbit public
...quarters was 182 kwhr (computed from R. 539) for which the
...d \$2.73. At Las Vegas, Nevada, he would pay \$3.47, Boulder City,
...\$3.62, and Henderson, Nevada, \$3.48 for the same amount. But
...kwhr he would actually pay less at each of the other three Nevada
...the Navy charges. These comparisons are made from figures
...the Commission. Typical Residential Electric Bill, 1935. See

subject to Commission jurisdiction in those seven states finally, in arguing that federal regulation of the rate the Navy "would be of no effect whatever" because tary authorities may charge any rate "they desire" 66), the Company wholly overlooks the basic fact *public* interest in the Company's rate to the Navy is tially the same, whether the burden of excessive ra to fall first on the ultimate consumers of that energy rectly on the taxpayers.

***b. Resale of an Indistinguishable 25 Percent of the Energy Sold
Commission Regulation of the Sale***

The Company argues (Co. Br. 66) that it is impo see why sale of the 25%³⁴ resold by the Navy should n Commission regulation on the theory that the 2 its identity in the 75% which is not resold, and the the larger percentage should determine the treatme whole.

Here again the Company's objection is basically a one, having been raised in some form and at some practically every proceeding in which the Commission jurisdiction under Part II has been contested. The "pu ities" brought under Commission regulation by Pa typically companies whose income is derived predom from ultimate consumers and intrastate sales; the en handle is often predominantly energy produced and c in the same state, with an indistinguishable admixture state energy; their sales of energy moving interst include indistinguishable admixtures of energy movin intrastate; and the facilities found to be jurisdictional

³⁴ The Company's figure of 25 percent is apparently a rounding percent shown by R. 270, for the year 1949. (The Commission percentages ranged from 15.4 percent to 28.6 percent for the ye 1948, inclusive, in parts of findings, R. 90, 105, not objected 114-115.) That evidence shows that the 24 percent does not in properly attributable to that 24 percent and we believe the n not show what those losses were. In this connection we ma

been made to ground objections to the Commission's jurisdiction over sales of *mixtures*. Attempts have been made to ground objections on various forms of Commission regulation on such matters. But in no instance where the Commission has asserted jurisdiction in the face of such an objection has the objection been sustained by the courts. Where the courts' opinions reflected the objections they have overruled them. *Jersey Electric Co. v. F. P. C.*, 319 U. S. 61, 66-67, *affirming* 183, 186-189 (C. A. 3) (where the energy flows are fully described); *Connecticut L. & P. Co. v. F. P. C.*, 319 U. S. 515, 535-536; *Hartford E. L. Co. v. F. P. C.*, 131 F. 2d 953, 958 (C. A. 2), *certiorari denied*, 319 U. S. 741; *Indiana W. & P. Co. v. F. P. C.*, — F. 2d — (C. A. D. C. 6), 10,236, 10,239, 10,531, decided July 3, 1951 (slip sheet, 10,531), *certiorari granted*, February 4, 1952. See also *Natural Gas Corp. v. P. S. C.*, 119 F. 2d 417 (C. A. 6), 28 F. Supp. 509 (D. C. E. D. Ky.). This unvaried line of decisions is consistent with the earlier decisions denying jurisdiction over sales of *mixtures*.^{35a}

I take space to discuss only two of these cases. In the *Connecticut L. & P.* case, *supra*, the Commission found that

Kansas Gas and Electric Company, 1 F. P. C. 536, 543-544, 26 PUR NS 59; *Hartford Electric Light Company*, 2 F. P. C. 359, 365-366, 26 PUR NS 193, *affirmed*, 131 F. 2d 953 (C. A. 2), *certiorari denied*, 319 U. S. 741; *Chicago District Electric Generating Corporation*, 2 F. P. C. 412, 26 PUR NS 263; *Connecticut Light & Power Company*, 3 F. P. C. 132, 26 PUR NS 170, *set aside on other aspects*, 324 U. S. 515; *Safety Power Corporation*, 5 F. P. C. 221, 235, 66 PUR NS 212, 109 F. 2d 179 (C. A. 3), *certiorari denied*, 339 U. S. 957; *Pennsylvania Light & Power Company*, 8 F. P. C. 1, 12-17, 82 PUR NS 193, *affirmed*, — (C. A. D. C. Nos. 10,236, 10,239, 10,531), decided July 3, 1951, *certiorari granted*, February 4, 1952; *Florida Public Utilities Company*, 109 F. 2d 189, issued January 25, 1950, pp. 11-15 (mimeo.); *Arizona Electric Light & Power Company, Inc.*, Opinion No. 190, issued March 31, 1950, pp. 6-7, 9, 10, 84 PUR NS 3; *Western Light and Telephone Company, Inc.*, Opinion No. 199, issued September 20, 1950, pp. 1-3 (mimeo.), 87 PUR NS 199; *Michigan Power Company*, Opinion No. 213, issued June 1, 1951, pp. 6-10 (mimeo.), 89 PUR NS 97, petition for review filed C. A. 7, 10,531, 10,534, 1951.

Arizona Electric Light & Power Co., 265 U. S. 298; cf., *P. U. C. v. Landon*, 249

While those sales both made in Kansas consisted principally

its ownership and operation, in addition to three other facilities, of a 14-mile, 33 kv transmission line tenancies, running from Montville on the west side of the Thames River above New London to Groton Long Point on the east side of the river at its mouth, all in the State of Connecticut. There it had sold an average of 4,634,212 kwhrs a year³⁶ to the Borough of Groton. The Borough then resold an average of 1,368,412 kwhrs a year, or 29 per cent of its purchases, to a privately owned utility which transmitted it by submarine cable under Fishers Island Sound to Fishers Island, New York, and there distributed and resold to domestic consumers. The Commission held that the 33 kv transmission line was a facility for transmission of electric energy in interstate commerce. The Company objected to the order on the ground of the relatively small amount of interstate energy transmitted, which it sought to emphasize by comparing to the total system energy. Although the Supreme Court affirmed the Commission's order on other grounds, it rejected the contention (324 U. S. at pp. 535-536):

Another contention made by the Company was that the order was shortly disposed of. It is contended that the amount of energy passing over certain of these facilities was insignificant in proportion to the total. Only one-fifth of one per cent of all the energy received by the Company throughout the year 1934-35 was transmitted out of the state of Connecticut at the time of the connection of Fishers Island with the Borough of Groton. Congress appears to have no objection to the Commission's sound administrative discretion to determine whether or not to assert its authority in such situations. Congress annually receives a report of the Commission's work and appropriates the funds for its continuance. If it thinks the Commission is diverting its attention to trivial situations it can change the means of control in its hands. The wisdom of such action is not our concern, but only its legal justification.

n of the Commission upon any particular volume or
portion of interstate energy involved, and we do not
think it would be appropriate to supply such a jurisdic-
tional limitation by construction.

Penn Water case, *supra*, the petitioners objected to
Commission's order, insofar as it regulated Penn Water's
three Pennsylvania utilities, that not over 17 percent
energy delivered to those utilities had originated out of
that the sales of the total should, therefore, be held
state regulation and outside the Commission's rate
power.³⁷ The Court of Appeals rejected the objection in
its opinion cited above on the ground that the
energy originating out of state was electrically and economi-
cally indistinguishable from that originating within the state
regulated.

The evidence in the present case is likewise plain and uncon-
tested that the energy resold by the Navy is indistinguish-
able from the rest of the energy in the sale to the Navy.
The "services * * * have always been lumped
into one bulk sale," according to the voluntary stipulation
of the Navy counsel (R. 273). In fact, to distinguish it would
require a separate, parallel transmission line from the delivery
point at Hawthorne, 50 miles distant, so that one line could be
used to carry the resale load exclusively (R. 313).

***Provision for Resale Is Unnecessary to Constitute the Sale a
"Sale for Resale"***

The Company argues (Co. Br. 67) that its sale to Navy is
not for resale because it "has never agreed to sell energy
for resale * * *," and cites part of a dictionary
quoting Kipling in an effort to establish that contract
does not reflect intent or Company intention that the energy shall be
resold.

Again, the cases are against the Company, particularly
because of the fact of its knowledge of the transmission out of
the state for resale (knowledge found by the Commission in parts

R. 114-115). *Jersey Central P. & L. Co. v. F. P. C.*, 319 U. S. 61, 68-73; *Hartford E. L. Co. v. F. P. C.*, 131 F. 2d 953, (C. A. 2), *certiorari denied*, 319 U. S. 741.

D. These Sales Are Not Excepted as Sales Made Local Distribution"

Thrown in with the Company's contentions which have been considered, above, is another familiar argument: that the sales are not within the Commission's jurisdiction because of the Section 201(b) exception from Commission jurisdiction for "facilities used in local distribution" (Co. Br. 62-63). It is difficult to imagine a case in which the argument would be apposite.

The Company's inadequate treatment of the point merits an effort even to suggest any legal theory by which the sales are excepted. The exception of *facilities* is to be transmuted into an exception of *sales*.³⁸ It offers no rationalization of its attempt to remove these sales from the Commission's jurisdiction sales indistinguishable from the *Attleboro* and *Kansas Gas Co.* sales (*supra*, p. 18), and it was the constitutional impotence of the states to regulate such sales which was the principal reason for the enactment of the rate provisions of Part II, as we have shown (*supra*, p. 16). The Company seems to make its contention that the transmission facilities here involved, which carry distances up to 80 miles on the Company's system (R. 114-115) and fifty miles and more further on the purchasers' system (Co. Br. 231, 292), from isolated hydro plants to remote communities, do not constitute "local distribution," in complete disregard of the holding of the Supreme Court in *F. P. C. v. East Ohio* (338 U. S. 464, 469-470). There under parallel provisions of the Natural Gas Act³⁹ the Court held:

But what Congress must have meant by "facilities used in local distribution" was equipment for distribution

³⁸ It is an elementary rule that exceptions from a general policy embodied in law should be strictly construed. *Interstate Natural Gas Co. v. F. P. C.*, 331 U. S. 682, 690-691; *Spokane & Inland R. R. v. United States*, 331 U. S. 682, 690-691.

unity, not the high-pressure pipe lines transporting the
s to the local mains.

Furthermore, the Company makes no effort to reconcile its
at the 55 kv facilities here involved are used in local
ion, with its admission that exactly similar facilities ⁴⁰
mission to Nye and Esmeralda Counties, Nevada, are
to the Commission's jurisdiction (Co. Br. 6), hence not
local distribution.

to the Company does not even suggest any want or
cy of factual support for the Commission's findings
Company's facilities used in making these sales are
ilities used in local distribution (R. 98-99, 108).
no such suggestion could be sustained in view of the
verted testimony of the Commission's engineer who
investigation and study of the facilities and their
a (R. 337). His testimony finds corroboration in the
s references showing the prevalent practice in the in-
to distinguish facilities used in "distribution" from the
ilities here involved—in Company contracts (R. 589,
606, 608-609, 610-612), in the Navy "Permit" to Min-
nty (R. 522), in testimony (R. 268), and in the very
dules prescribed by the California Commission which
pany seeks to apply to these sales (R. 483-484, 485-
his evidence, too, was uncontroverted.

cluding this point we may note that the Company's
t, based on its description of the 55 kv facilities as serv-
ctly or indirectly" all of its local customers in Mono
(Co. Br. 8; cf. 26, 62-63) would make the entire indus-
t from regulation under Part II. For there is not a
r or transmission facility, anywhere, that does not
or indirectly" serve local customers. That is what all
ilities of electric utilities are "for." The exception is
ies "used in" local distribution.

g answered each of the four claims advanced by the
y in its attempt to avoid Commission jurisdiction un-
II, we are now able to answer somewhat more

THE OBJECTIONS TO COMMISSION JURISDICTION UNDER PART I ARE WITHOUT MERIT

The Company's objections to Commission jurisdiction over these rates under Part I (Co. Br. 45-57) all depend upon the assumption that Sections 19 and 20 authorize regulation, under the usual state regulatory statutes, of state wholesale rates like those here involved, which, as already shown, in the silence of Congress are beyond constitutional power of the states under the decisions in *W. v. Kansas Gas Co.*, and *P. U. C. v. Attleboro S. & E. Co.* (p. 18). Therefore, before undertaking to answer the similar objections advanced by the Company, we shall state whatever other doubts there may be as to this assumption. If any state regulation of interstate wholesale rates was authorized in Part I, it was enforcement of Section 20 state regulation by agreement of the states directly concerned.

We may begin with the historical fact that Sections 19 and 20 were enacted without legislative attention being given to any constitutional inability of the states to regulate interstate electric energy sold in interstate commerce, even at wholesale. This is reflected in Sections 19 and 20 by the absence of any distinction, like that in Part II, between sales at wholesale and sales at retail in local distribution. The principal distinction drawn in Part I is that between sales (both at retail and wholesale) in which the power enters interstate commerce, to which Section 20 applies, and all other sales which are left to the states under Section 19. Upon this distinction two differences have been pointed out which we shall discuss below: Section 20 contains a substantial provision, not found in Section 19, that interstate rates and charges "shall be reasonable, nondiscriminatory, and just" and that "all unreasonable discriminatory and unjust rates and charges are hereby prohibited and declared to be unlawful"; Section 19 also provides that "whenever any of the States directly or indirectly involved in interstate commerce shall have failed to regulate such interstate commerce in accordance with the provisions of this act, the Commission shall have the authority to regulate such interstate commerce in accordance with the provisions of this act."

for such States are unable to agree through their appointed authorities on the services to be rendered or on the rates or charges of payment therefor, * * * jurisdiction hereby conferred upon the commission * * * to enforce the provisions of this section * * *."

Looking up those provisions, it should be noted that the decisions which pointed up the constitutional restriction on the commission power to regulate wholesale rates of interstate commerce had not been handed down at the time of the original enactment of Part I in 1920. There was of course the commerce clause itself with its well known genesis in the purpose to prevent individual states from regulating in the interest of their several interests, *e. g.*, as producer or consumer states, or as competitor states, "commerce which concerns more states than one."⁴¹ There was also *The Daniel* (10 Wall. 557), establishing that even an intrastate interstate journey is subject to Federal regulation. And the state utility regulation of local retail distributing rates for natural gas originating out of state, where upheld under the commerce clause, had been upheld in *P. U. C. v. Landon*, 249 U. S. 236; *Pennsylvania v. P. S. C.*, 252 U. S. 23.

Ex parte Kansas Gas Co. (265 U. S. 298), which was to require interstate wholesale rates for natural gas to be outside the state, was four years in the future. And *P. U. C. v. Louisville & E. Co.* (273 U. S. 83), which would for the first time focus the problem of the constitutional inability of the states to regulate interstate wholesale rates in the electric industry, lay seven years in the future.

During Sections 19 and 20 Congress was, therefore, not faced with itself to any problem calling for the vesting in the states of power constitutionally withheld from them in the

United States v. Ogden, 9 Wheat. 1, 194, 224-225; see *United States v. Southwestern Writers Assn.*, 322 U. S. 533; Stern, That Commerce Which Concerns More States Than One, 47 Harv. L. Rev. 1335, 1361; II Farrand, The Federal Convention (Rev. Ed. 1937) 308, 441; III Farrand, 478, 519, 547-548; The Federalist No. XXII (Everyman's

whenever they had, making clear that federal licenses were not, by virtue of their status as federal licensees, from state regulation.⁴³

This is shown very clearly by the testimony, in the Committee hearings, of Mr. O. C. Merrill, presented in views of the Administration on behalf of the Administration bill.⁴⁴ Mr. Merrill's testimony is clear that the Administration, in proposing the bill, assumed that the states could regulate all the rates involved in Section 20, and that it was intended to be "left" with the local authorities to the extent they had the power of regulation, and not authorized beyond that.⁴⁵

But Congress perceived that, even as to regulation of rates for interstate energy in local distribution, as the state regulatory jurisdiction was clearly established, the interests of the states directly concerned might be in each state wanting as much of the benefits from low cost electric generation as possible for its own citizens, in one or another (*infra*, pp. 54-55). Against that likelihood perhaps as well against any possibility of constitutional challenge to regulatory power in the states over other interstate rates, Congress provided in Section 20 the standard which should

⁴³ Contrast the clear manifestation in other statutes of Congress purpose affirmatively to permit application of state authority to transactions constitutionally withheld, in the silence of Congress in *Rahrer*, 140 U. S. 545, 549, 562; *Clark Distilling Co. v. Western Ry. Co.*, 242 U. S. 311, 321, 332; *Whitfield v. Ohio*, 297 U. S. 43; *Kentucky Whip & Collar Co. v. I. C. R. Co.*, 299 U. S. 334, 341; *Federal Life Insurance Co. v. Benjamin*, 328 U. S. 408, 429-431.

⁴⁴ See *Broad River P. Co. v. Query* (288 U. S. 178, 180) for attention by a licensee that as such it was exempt from state

⁴⁵ Mr. Merrill's testimony is quoted in the Commission's opinion in *Safe Harbor Water Power Corporation* (5 F. P. C. 221, 240-242. (R. 212) (1946), *affirmed*, 179 F. 2d 179 (C. A. 3), *certiorari denied* (R. 957). Inasmuch as the Commission's order here under review is that *Safe Harbor* opinion and "reaffirms" the conclusion that (R. 95), we have printed the relevant portion as Appendix A (*infra*, pp. 47-58).

⁴⁶ The Company's discussion of Right of Way Acts and Department Regulations prior to 1920 (Co. Br. 27-30) discloses no re-

concerned to administer and enforce that standard by
if they could do so effectively, and provided that
should not, the Commission should.

That agreement was conceived to be one made under
act clause of the Constitution (Art. 1, Sec. 10, Cl. 3)
rely clear. The only Court that has had the ques-
tioned to it for decision has held that it was. *Safe*
P. Corp. v. F. P. C. (124 F. 2d 800, 807-808 (C. A.
Tri denied, 316 U. S. 663). On the other hand, the
formal approval is not consistent with the practice of
in giving express and formal approval to interstate
and is, in fact, found only in the implication of
the phrase "or such states are unable to agree." Fur-
ther, if Congress intended to give its approval under the
clause (Art. 1, Sec. 10, Cl. 3), it was thereby confer-
ring upon the states to do by such agreements what
individually did not have power to do—which was more
Merrill's testimony indicates the Administration in-
proposing the language.⁴⁷

Whatever that may be, two things at least are clear from
reading of Section 20 as to the state action therein contem-
plated. (1) It is the service and rate standard of Section 20
to be "enforced"—not a state law standard as in Sec-
tion 19, but one enforced by a "commission or other authority"
of a state for the purpose of enforcing that standard
(rest of Section 20); (2) The enforcement of that
standard must be the result of agreement upon that enforce-
ment by "properly constituted authorities" of each of the
states directly concerned.

Olin v. Kitzmiller, 259 U. S. 260, 262; *Arizona v. California*,
290 U. S. 449; cf., *United States v. Arizona*, 295 U. S. 174, 183; see also
Natural Gas Act, 52 Stat. 821, 827, 15 U. S. C. §§ 717, 717j.

Congress is to be deemed to have been acting in the exercise
of its constitutional power with respect to the territory and property of the
states (Art. IV, Sec. 3), as the Company contends (Co. Br. 37), or
the clause seems largely academic. For Sections 19 and 20
concern those whose projects are located on or affect navigable waters

Commission action. *Safe Harbor W. P. Corp. v. F. F. C.* 2d 179, 191-193 (C. A. 3), *certiorari denied*, 339 U. S. 861. Equally clearly, "agreement" by a state agency, such as the Nevada Public Service Commission in this case, which is not charged by the State of Nevada with no responsibility or authority of any kind whatever as to the regulation of the Company's rates here in question,⁴⁸ would be completely inoperative. It would have no more legal effect than "agreement" by a state board of medical examiners. As the Third Circuit said in the first *Safe Harbor* case (124 F. 2d at p. 806): "The intention of Congress that there should be regulation of the production and control of hydroelectrical energy and not that impotent advisory bodies would be set up by the states to go through the motions of regulation."

Thus, Section 20, by stipulating inability to agree with the state agencies as the condition precedent to Commission action, made plain that the state regulation intended to be displaced by the states directly concerned as equals, was not assuming the prerogative of regulation, and the other provisions of the Act of petitioners or protestants before it, as the Commission found (Co. Br. 46-48).

Corroboration of the foregoing interpretation is afforded by the history of the 1935 amendatory legislation. Nowhere does there appear any evidence of a belief by Congress in 1935 that the Federal Water Power Act had conferred any power on individual states over interstate wholesale rates, or, if it had, that the states had any power from any source over any such rates. On the contrary, it repeatedly appears that Congress intended in Part II to confer jurisdiction over all interstate electric rates, as having been "placed * * * beyond the reach of the States" by the *Attleboro* case (H. Rep. No. 621, 74th Cong., 1st Sess., p. 17). Nowhere in the reference to that subject in the legislative history of the 1935 Act have we found any statement or inference that

⁴⁸ The Commission found (R. 93-94) that the Nevada Commission had no statutory power or responsibility with respect to the fixing of rates.

es under Part I.

is understanding of Section 20 we may turn to the objections which the Company urges.

Commission Properly Found That Section 20 Was Applicable

slightly casual reference⁴⁹ the Company seeks to make some objection to jurisdiction under Section 20 that does not "enter into interstate commerce", presumably, as it had urged with respect to Part II, the purchasing of the power must be deemed nonexistent under Section 201(f). This objection is answered, if answered, by what we have already said (*supra*, pp. 16-17). Another objection to the applicability of Section 20 seems to lie in the Company's objection that the Commission in finding Section 19 and in not finding these rates subject to California Commission regulation under that Section (pp. 3-17, 32, 45). But we think it plain from what we have already said that Section 20 carves an exception from the rule of all cases in which the power enters interstate commerce.

Hence, if the Commission was correct in finding that the power here sold does enter interstate commerce, as we have already shown, the Commission properly treated Section 20 as immediately applicable Section directly involved, so that Part I is concerned.

Commission's Findings Supporting Its Assertion of Jurisdiction Under Section 20 Were Correct and Fully Sustained

The Company also objects to the Commission's findings with respect to its jurisdiction under Part I, contending that "There are no properly qualified state commissions in this case

The Company only says (Co. Br. 46): "Assuming that interstate commerce is involved (*which Petitioner denies*) it is only necessary (etc.) to say elsewhere it seems to have conceded the point in formally specifying (Co. Br. 17): "F. P. C. erred, *after finding* [Finding 14: R. 108]

Br. 17), and also seeks to question the adequacy of the finding of one of the findings (Co. Br. 21).

To be qualified to effectuate the state regulation contemplated by Section 20 for these rates there would at least be a commission or other authority properly constituted by the State of Nevada with power to agree with a commission or authority of the State of California on the enforcement of Section 20, as we have shown (*supra*, pp. 36-37). The interpretation of Section 20 as requiring a state authority having such power is neither "bizarre" (Co. Br. 52) nor "strange and unheard of" (Co. Br. 53) is suggested by the fact that in court cases⁵⁰ in which licensees have heretofore claimed that state commissions have jurisdiction under Section 20, but in cases which involved the Pennsylvania and Maryland Public Utility Commissions. Both of those Commissions have expressly given such power by their respective state statutes.⁵¹

Here it is clear that the Nevada Commission is not constituted with any responsibility or power of any kind as to the regulation of the Company's rate to the Navy or Mineral Leasing (see *supra*, p. 6). The Chairman clearly so indicated.

⁵⁰ *Safe Harbor W. P. Corp. v. F. P. C.*, 124 F. 2d 800 (C. A. 3), *certiorari denied*, 316 U. S. 663; *Safe Harbor W. P. Corp. v. F. P. C.*, 175 F. 2d 1000 (C. A. 3), *certiorari denied*, 339 U. S. 957; *Pennsylvania W. & P. Co. v. F. P. C.*, 124 F. 2d —, (C. A. D. C. Nos. 10236, 10239, 10531) decided June 10, 1942, *certiorari granted*, February 4, 1952.

⁵¹ Pennsylvania Public Utility Law, Section 913(a), reads: "The commission shall have full power and authority to make joint investigations, hold joint hearings within or without the Commonwealth, issue joint or concurrent orders in conjunction or concurrence with any official board, commission, or agency of any state or of the United States, in the holding of such investigations or hearings, or in the making of such orders, the commission shall function under agreements or compact with any state or states or under the concurrent power of states to regulate the commerce, or as an agency of the Federal Government, or

Maryland Public Service Commission Law, Section 348, reads: "The Commission shall have full power and authority to make joint investigations, hold joint hearings, and issue joint or concurrent orders in conjunction or concurrence with any official board or commission of any state or of the United States, whether in the holding of such investigations or in the making of such orders the Commission shall func-

46) and the Company points to nothing in the record Nevada Constitution, statutes or decisions as showing any. The fact so strenuously urged by the Company (50-51), if it is a fact,⁵² that the Nevada Commission refused to pass on the rates which Mineral County's customers in Hawthorne, Luning, and Mina, New Mexico has nothing to do with the existence of any authority to participate by agreement or otherwise in regulation matters here involved.⁵³ The Company as much as says it refers to the Nevada Commission as not "being authorized to operate extraterritorially" (Co. Br. 52), although it is in agreement with the California Commission upon that Commission's enforcement of Section 20 as to these rates involves nothing beyond Nevada's power as "extraterritorial," if authorized by the compact clause (Art. 1, Sec. 10, Cl. 3) of the Federal Constitution. The Commission was, therefore, abundantly justified in finding as it did in its opinion here (R. 95), which was incorporated in and made a part of its order (R. 103):

It is apparent that the Public Service Commission of Nevada is without authority with respect to rates charged Mineral County or the Navy, and therefore cannot be regarded as a "commission or other authority to enforce the requirements of" Section 20, and it follows that no further showing is required to support the conclusion that it is *impossible for a properly constituted authority of Nevada to agree with the California Commission concerning the rates charged Mineral County and the Navy.*

The legal sufficiency of this factually uncontested finding to support the conclusion that the Commission has jurisdiction

to the hearing in this case neither the Nevada Commission, the General of Nevada, nor Mineral County were of that opinion or advised, R. 244-249.

The Company's suggestion (Co. Br. 54) that if Mineral County pays a rate for the energy it purchases from the Company the Nevada Commission could refuse to allow Mineral County to charge its customers

ther argument from a mere comparison with the relation of Section 20:

* * * and whenever any of the States concerned has not provided a commission or other authority to enforce the requirements of this section within the State * * * or such States are unable *through their properly constituted authorities* to render the services to be rendered or on the rates or charges to be levied, jurisdiction is hereby conferred upon the Commission, upon complaint of any person aggrieved, * * * or upon its own initiative, to enforce the provisions of this section * *

The Company argues (Co. Br. 21) that it was insufficient for the Commission to find, in Finding No. 16 (R. 108), that the rates "are subject to regulation in accordance with the provisions of Section 20." The Commission should have said that the Company says, the words: "by the F. P. C." But even the phrase *by the Commission* is not adequately implied by Finding No. 16 in the context supplied by Findings Nos. 1 and 2 (that the power enters interstate commerce, that Nevada is one of the "States directly concerned," and that Nevada has not provided a regulatory commission or other authority to enforce the requirements of Section 20 as to these sales), it is sufficient by the Commission's discussion of "our jurisdiction" in Part I in its Opinion (R. 92-96), which is expressed in the part of the order (R. 103). In any event the Company was precluded by Section 313 (b) from urging this objection, and it did not urge it in its application for rehearing before the Commission (R. 119-120) when any deficiency in phraseology might have been easily cured. *Panhandle Eastern P. & O. R. Co. v. F. P. C.*, 324 U. S. 635, 649, 650-651.

**MISSION PROPERLY REQUIRED THE RATES
IED IN THE SPECIFIED CONTRACTS TO BE
AND ADHERED TO**

the Commission's order here under review as reinstatement of "contracts which, by or pursuant to, have terminated" (Co. Br. 68), the Company says: "*arguendo* that jurisdiction existed, this phase of was arbitrary, irrational and unsupported by law" (R. 20). It goes on to say: "The only proper order in the alternative, either to file and desist from the service. If rates were then appeared unfair or unreasonable, FPC could have under Section 205(e) to suspend the rates and enter an order" (*ibid.*).

order plainly does not read as the Company treats as not require reinstatement of the contracts. It merely directs the Company to do that which it is required to do by the Act, and by regulations thereunder which have not been questioned. As the Company's counsel has agreed (R. 223): " * * * in this hearing we are saying that it is an unfair rate."

to consider the rate to Mineral County first) the Commission has ordered not to charge Mineral County any rates other than those reflected in filed Rate Schedule FPC No. 100 and unless such schedule is duly superseded by a later supported new filing or by a rate prescribed by Commission order" (R. 110-111, *supra*, p. 1). "Rate Schedule 100" is the designation given by the Commission to the Company's contract with Mineral County (R. 404) which, the Company says, had expired by its terms. That contract was filed under Section 205(c) of the Act and Section 205 of the Regulations and designated as "Rate Sched-

R. § 35.3(a): "*Obligation to file.* Every public utility shall file with the Commission full and complete rate schedules clearly

of course, are definitions of the service to be rendered by the method of computing the consideration to be paid for that service. Those definitions constitute the "rate" created by filing the contract, where there is only one or a few customers for the service in question, a company complying with the requirement that it file its rates and that it file contracts affecting or relating to its rates (Section 2).

Although the private contract rights and obligations are limited to the three-year term of the contract (subject to the effect of paragraph 5 of the contract (R. 408) which makes the contract subject to filing in accordance with the Rules and Regulations of the Commission) the *rate* created by the rate, was terminable only by filing and posting a notice of cancellation as provided in Section 35.5⁵⁵ of the Reg-

such rates, and all contracts which affect or relate to such rates, classifications, or services as required by section 205(c) of the Federal Power Act (49 Stat. 851; 16 U. S. C. 824d(c)). Where two or more utilities are parties to the same rate schedule, each public utility providing service, transmitting, selling, pooling or interchanging electricity shall post and file such rate schedule, or the rate schedule may be filed by one such public utility and all other parties having an obligation to file. It may post and file a certificate of concurrence on the form prescribed by § 131.52 of this chapter."

⁵⁵ 18 C. F. R. § 35.5: "*Notice of cancellation.* When a rate schedule, charge, classification, or service, or any rule, regulation, or condition relating thereto and on file with the Commission is proposed to be cancelled, no new rate schedule is filed in its place, except as in this paragraph. Each public utility required to file the schedule shall formally notify the Commission of the proposed cancellation on the form indicated in this chapter at least 30 days prior to the proposed effective date of cancellation; and shall therewith submit a statement showing the reasons therefor and that notice has been served upon each utility that is a party to the rate schedule. A copy of such notice to the Commission shall be duly posted. For good cause shown, the Commission may permit a cancellation to be filed within less than 30 days of the proposed effective date thereof."

⁵⁶ If, under the facts of a particular case, the term of the contract is deemed to be a part of the definition of the service or consideration, it is therefore part of "the rate," it yields to regulation. For it has been held that private contract rights must yield to public authority. The constitutional interdiction of statutes impairing the obligation of contract does not prevent a regulatory commission from abrogating pri-

changed, under Section 205(d) of the Act and Sec-
)⁵⁷ of the Regulations only by duly filing a changed
Company had first attempted to file a changed rate
withdrew its incomplete submittals (*supra*, p. 4).

ently, the rate embodied in the contract continued
led rate and as such continued to be the only legally
e rate. *Montana-Dakota U. Co. v. Northwestern*
41 U. S. 246, 251. The service continued to be ren-
the claimed expiration of the contract, but the Com-
and collected therefor amounts in excess of the filed
n, under protest (R. 641), was paid by Mineral
because it had no alternative source of energy (R.
doing so the Company had violated, and continued
Sections 205(d) and 20 of the Act and Sections
35.2,⁵⁹ and 35.20⁶⁰ of the Regulations. Clearly, it
reason of its violations derive the advantage⁶¹ of

Co., 300 U. S. 109, 113-114; *Union Dry Goods Co. v. Georgia*
Corporation, 248 U. S. 372, 375-377; *cf.*, *F. P. C. v. Natural*
Co., 315 U. S. 575, 582.

R. § 35.3(c): "*Changes in filed rates, charges, etc.* All rate
making a change in any rate, charge, classification, or service on
Commission, or in any rule, regulation or contract relating
be posted and filed with the Commission not less than 30 days
proposed effective date thereof, unless a shorter period of time
by the Commission; and as to each proposed change there
mitted to the Commission: * * *

57, *supra*.

R. § 35.2: "*Effective rates and charges.* No public utility shall
directly demand, collect, or receive, for the transmission or sale
energy subject to the jurisdiction of the Commission, or for the
ization of any facilities subject to the jurisdiction of the Com-
rate or charge different from that prescribed in its rate sched-
les actually on file with the Commission, unless the Commis-
good cause shown, otherwise provide by order."

R. § 35.20: "*Filing.* Every licensee shall file with the Com-
l and complete copy of every rate schedule, tariff, contract, or
ad all supplements thereto, providing for the sale at wholesale
consumption, resale, or any other use whatsoever by the pur-
ectric energy or mechanical horsepower generated or developed
ilities of the licensed project: *Provided, however,* That rate
contracts, agreements, etc., filed pursuant to the provisions of

mission's power of suspension under Section 205(e). Under Sections 205(c) and 20, as well as to "car provisions" of the Act as contemplated by Section Commission was, therefore, clearly warranted in f 109) that it was "reasonable and appropriate" to Company to cease and desist from charging any rate the last duly filed, uncanceled, and unchanged rate. As the Supreme Court said of the company in the *Dakota U. Co.* case (*supra*, p. 43): "It can claim no legal right that is other than the filed rate * *

As to the rate to Navy, the Company is in no better from the fact that its violations of the applicable requirements have continued for a longer time. It has and continued to be in violation of Sections 205(c) of the Act and Sections 35.2,⁶² 35.3(a)⁶³ and 35.20⁶⁴ of by not filing the Navy rate. It sought to change it illegally, in violation of Sections 205(d) and 20 by a higher rate, which it did not file. The service continued to be paid for at the old rate (*supra*, p. 5). The higher rate was therefore no more than something the Company wanted (unsuccessfully as a matter of fact, and ineffectively as a matter of law⁶⁵) to bring about, and the old rate continued to be rate actually collected at the time of the Commission's ruling. The Commission was therefore fully justified under Sections 205(c), 20 and 309 in ordering the Company to file the rate previously contracted for and being paid at the time of the Commission's ruling and to cease and desist from charging any other than a duly

IV

THE COMMISSION'S RULINGS ON ADMISSIBILITY OF EVIDENCE AND REFUSAL TO REOPEN THE CASE WERE CORRECT

The Company objects (R. 18-20) to the Trial Court's receipt in evidence (R. 189) of a letter opinion of the

⁶² See note 59, *supra*, p. 43.

Nevada (R. 510-514), and to the Commission's evidence (R. 111-112) of a letter of the Nevada Commission (R. 247-248); also to the Commission's denial (R. 147) of the company's motion (R. 126), at the time of its application for rehearing, to reopen the record for the purpose of introducing another letter opinion (R. 129) of the Attorney General of Nevada.

The opinion of the Attorney General as to the jurisdiction of the Nevada Commission over municipal corporations (R. 14) and the letter of the Nevada Commission advising the customer (R. 248-249) of Mineral County Power System that the Commission had no jurisdiction over the Mineral County Power System (R. 247-248) both related to the question of the position actually taken by that Commission as to its jurisdiction over Mineral County, and the basis of the testimony concerning that had already been re-examined in witness Parker without objection (R. 244).

Q. Have you been officially advised as to whether the Nevada Public Service Commission has any jurisdiction with respect to the rates charged the Mineral County Power System?

A. Yes. Mr. J. G. Allard, Chairman of the Nevada Public Service Commission, informed me that his Commission has no jurisdiction with respect to electric rates under the statutes of Nevada.

Moreover, it is clear from the Commission's opinion and that the Commission did not rely on either letter as a basis for its decision, for its decision deals only with the question of the Nevada Commission's statutory responsibility or authority with respect to the rates charged Mineral County and the Navy Company, not Mineral County's retail rates, as we have previously stated (*supra*, p. 39). If the admission of either letter had been necessary, it would have been clearly non-prejudicial.

Therefore, the Commission's order cannot be invalidated for lack of such evidence in any event, in view of the provision in Rule 308(b) that the technical rules of evidence need not be strictly followed.

erroneous. Not until a year after the hearing on March 21, 1950, briefs having been filed in May, June, 1950 (R. 14), and the Commission order and opinion of April 13, 1951 (R. 102, 112), did the Company on April 13, 1951 (R. 138) move (R. 126-127) to reopen the record to receive in evidence an opinion of the Attorney General dated April 24, 1950. The motion contained no authority showing that the opinion could not have been produced when the briefs were filed, the Examiner's Decision and Order thereeto, or the Commission decision. Furthermore, the opinion of the opinion makes clear that it could have had no effect upon the position previously taken by the Nevada Commission as to its jurisdiction. The denial of the motion was clearly not erroneous.

Moreover, the opinion is of a purely legal nature, raising the same questions as to the Nevada Commission's jurisdiction over Mineral County's retail rates already shown to be irrelevant to the Commission's decision, and the Commission's denial on the ground of such irrelevancy (R. 147). Even if the motion, even if erroneous, could not have been successful, and clearly constitutes no basis for setting aside the Commission's order.

CONCLUSION

For the foregoing reasons the Commission's order is affirmed.

Respectfully submitted.

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Federal Power Commission, Washington 25

Of Counsel:

LEONARD EESLEY,

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APPENDIX A

om the opinion of the Federal Power Commission,
Harbor Water Power Corporation, 5 F. P. C. 221,
66 PUR NS 212, *affirmed* 179 F. 2d 179 (C. A. 3), *certi-*
fied, 339 U. S. 957 (referred to in the opinion part of
here under review, R. 93, 95) :

*

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Harbor, as a "licensee," *excepted from the provisions*
—Although it owns and operates facilities subject to
tion of the Commission under Part II, which bring
[236] within the definition of a "public utility,"
r argues that it should be excepted from the defini-
effect, it seeks to have us construe section 201 (e) as
A 'public utility' is any person who owns or operates
subject to the jurisdiction of the Commission under
except licensees."

pts to support its contention for an implied excep-
uing that such an interpretation gives proper effect
clause of the declaration of policy in section 201 (a).
ation, in its entirety, reads as follows:

is hereby declared that the business of transmitting
selling electric energy for ultimate distribution
e public is affected with a public interest, and that
ral regulation of matters relating to generation to
extent provided in this Part and the Part next fol-
ng and of that part of such business which consists
e transmission of electric energy in interstate com-
e and the sale of such energy at wholesale in inter-
commerce is necessary in the public interest, *such*
ral regulation, however, to extend only to those mat-
*which are not subject to regulation by the States.*⁸
ics supplied.]

g upon the clause, "* * * such Federal regulation, how-

Harbor contents, are the interstate rates of license it says, are subject to the authority of the States concerned, to regulate under section 20 of Part I. We can see either that the last clause of the declaration of policy in section 201 (a) warrants reading an exception into the unexpressed provisions of the Act, or that the State regulation referred to in that clause was intended to include the interstate rates of "licensees."

The only judicial utterance in point which has attracted attention, is opposed to Safe Harbor's contention that a "licensee," it is impliedly excepted from the definition of "public utility" in section 201. This is found in the opinion of District Judge Bard (*Safe Harbor Water Corporation v. United States, et al.*, 37 F. Supp. 9, E. D. Pa.), subsequently quoted by the Circuit Court of Appeals for the Third Circuit (*Safe Harbor Water Corporation v. Federal Power Commission*, 124 F. 2d 800, 4 at p. 804):

Part II, as added in 1935, gives the Commission jurisdiction over the transmission and sale of electricity at wholesale in interstate commerce, whether by licensees.

We feel that we should not read into the Act's clear meaning of "public utility" the implied exception for which Safe Harbor contends, because we do not believe Congress intended to raise the question [237] of the coverage of Part II of the Act in the face of the uncertainties of implied exceptions. We think this is shown by the fact that exceptions which were intended by Congress were expressly stated in subsection (f) of section 201. We have heretofore construed most liberally.

Nor do we perceive any adequate explanation of Congress, in providing for the regulation of the rates

Light & Power Company v. Federal Power Commission, 324 U. S. 196, said that it is "one of great generality. It cannot be construed as a specific grant of jurisdiction, even if the particular grant is consistent with the broadly expressed purpose. But such a declaration is not entitled to such construction."

which are not "licensees" and excepted those "public utilities" which happen also to be licensees." If, on the other hand, Congress had intended to except any "public utility's" wholesale rates, and subject them to regulation by compact, there appears no reason why it should not do so for all "public utilities," but there is no pretense that Congress has done that.

Remaining doubt that we should reject the claimed exemption of a "licensee" from the definition of a "public utility" is removed by an examination of the legislative history of the bill. Representative Rayburn, Chairman of the Committee on Interstate and Foreign Commerce, in reporting the bill for the House Committee, explained why the prohibition in section 20 is directed against personal profit of officials and officers of "public utilities" without also naming "licensees," and that "licensees" having the requisite qualifications should be "public utilities":

The Senate bill includes *licensees* within the provisions of this section, but inasmuch as *such licensees when interstate operating public-utility companies will be subject to the provisions of the section in any event, licensees have been omitted* from the bill as reported, because of the lack of public interest in those companies which are not public utilities.⁹ [Italics supplied.]

Therefore, conclude that Safe Harbor owns and operates subject to the jurisdiction of this Commission under the Act that it is not excepted as a Part I "licensee" from the provisions of Part II of the Act; and that it is a "public utility" within the provisions of that Part for the regulation of rates. This brings us to a consideration of the effect of the rate provisions of both Parts on each other where, as here, there is a company subject to both.

Licensee-public utility" subject to regulation by this Commission under the rate provisions of both section 20 and

interpreted the condition in section 20, reading ever * * * the States directly concerned * unable to agree * * * on the rates," as conveying congressional consent to regulation of those rates by compact. *Safe Harbor Water Power Corporation Power Commission*, 124 F. 2d 800, 808. In the present case, Safe Harbor seizes on that interpretation to mount the argument which we have already considered and rejected, namely, that the language in section 20 precludes the exercise of jurisdiction by this Commission under Part II, and that it constitutes authorization for the States to regulate the rates of the interstate compact. On the other hand, the Commission contends that such conflict requires that the provision in section 20, as so interpreted, be deemed repealed by implication by the enactment of Part II in 1935, so far as applicable to a public utility." A necessary alternative to the latter contention is that the interpretation of section 20 which gives rise to the conflict should be avoided if possible.

This conflict was not presented and passed on by the Commission in the former proceeding for the reason we have already stated out, *i. e.*, that there, Safe Harbor had not been found to be a "public utility," and no assertion of jurisdiction under Part II had been made by this Commission. Hence, no question of conflict of our powers under Part II, or conflict thereof with the exercise of the power of the States under its interpretation of section 20 was before the Court, as the Court recognized and declared that the matter of jurisdiction under Part II was "immaterial" (124 F. 2d 800, at p. 809):

* * * whether or not the Federal Power Commission has jurisdiction over Safe Harbor as a public utility transmitting and selling electric energy at wholesale in interstate commerce under the provisions of the Federal Power Act, 16 U. S. C. A. § 824, is immaterial.

In view of our finding that Safe Harbor is a "public utility" as well as a "licensee," this conflict must now be

regulate rates by interstate compact, or if the conflict is avoided by giving some other interpretation to that part of our jurisdiction over interstate wholesale rates does not depend on the finding that the States are unable to agree, such a finding is superfluous to our assertion of jurisdiction under section 20. And, of course, if it shall appear that section 20 has been properly given another interpretation which avoids the conflict, that will further support our refusal to read an exception for "public utilities" into the definition of "public utilities" in

by implication.—If there is an unavoidable conflict between the provision of Part I, as enacted in 1920, and a provision of the Act added in 1935, the Court's opinion in the preceding makes clear that the later provision repeals the earlier by implication. For in another part of that same opinion the Court, dealing with a conflict between the provision of section 20, for review of Commission orders by District Courts, and the provisions of section 313 (b), for review of such orders by the Circuit Courts of Appeal, held that the former had been impliedly repealed by the latter. Accordingly, we hold that if section 20 authorizes regulation of a "public utility's" interstate wholesale rates by the States in the absence of an interstate compact, it is to that extent repealed by the later provision of Part II.

In connection, we have noted that Mr. John E. Benton, General Counsel, and for many years General Solicitor of the National Association of Railroad and Utilities Commissioners, has gone farther and expressed his belief that the rate-making provisions of Part II, being inconsistent with the rate-making provisions of section 20, are repealed by implication. *Jurisprudence* (1945), 14 Geo. Wash. L. Rev. 53, 78.

of conflict between section 20 and Part II.—We believe that the doctrine of repeal by impli-

changes in the regulatory situation between 1920 suggests that no conflict exists and that section 2 II of the Act have purposes to serve which neither standing alone.

In 1920, electric rate regulation was a matter of local concern. In the field of electric power, the widespread interconnection of systems across State large scale interchanges involving sales at wholesale was just beginning. Charges for such sales were treated as costs in fixing rates to consumers, which was the concern of regulatory activity.

The authority of the States to regulate rates for gas which had been transmitted across a State line established and qualified in two Supreme Court cases (*Pennsylvania Gas Co. v. Public Service Commission*, 233 U. S. 23; *Public Utilities Commission v. Landon*, 249 U. S. 20). But 7 years were to elapse before the Court, in *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 248 U. S. 83, would declare that interstate wholesale electric sales are beyond the jurisdiction of the States.

Acting under these circumstances, Congress sought to deal with the States whatever authority they had. The Federal Power Commission was given authority to regulate interstate power from licensed projects only to the extent that the States had not authorized commissions to provide the necessary regulation; or, if any part of such power entered interstate commerce, whenever the authorized agencies of States were unable to agree (secs. 19 and 20). But the authority of State agencies was to spring from action by the States within the limits of their own regulatory jurisdiction, which was recognized rather than expanded by Congress.

[240] Even if advance consent of Congress to agreement between the States must be inferred from the words, however "such States are unable to agree," it is entirely unnecessary to read into the words an expansion of State power or the grant of permission to agree on matters within

by law and practice of that day, unaffected by the
the Court in the later *Attleboro* decision. Accord-
e shall see, it was presumed that the existence of
missions, where disagreement did not render regu-
workable, would provide adequate protection of con-
licensed project power crossing State lines. Con-
fore, discerned no need to do more than provide for
ment to control and, absent such agreement, to
the Federal Power Commission to regulate the rates.
analysis is borne out by the legislative history of

Representative excerpts from that history, taken
hearings before the Committee on Water Power of
of Representatives, 65th Cong., 2d sess., are quoted
r. O. C. Merrill, presenting the views of the Secre-
ar, Interior, and Agriculture, with respect to sec-
the bill,¹⁰ is responding to questions from several
the Committee (pp. 66, 67):

r. FERRIS. And so far as interstate business is con-
ed the power of the board to fix the rate is absolute,
think?

r. MERRILL. The intention of the draft was this:
t insofar as the local authorities have the power,
exercise it, over rates and service, the Federal com-
ion should leave it alone.

r. FERRIS. That is true, of course, only within the
e.

r. MERRILL. Whether the plants which were regu-
l were entirely within the State or whether the lines
ed the State boundaries.

ministration Bill (H. R. 8716). The condition, in section 20 of
s: "* * * whenever the States directly concerned have not
individually to take action or are unable to agree through
y constituted authorities * * *." The language of the
changed in the substitute bill recommended by the Committee,
ith that of the Section as later enacted (*H. R. Rep. No. 715,*
sess., pp. 27, 10; see also, *id.*, p. 19, containing this statement
al analysis of the substitute bill reported by the Committee:
er provides that where a State has no authorized authority

jurisdiction?

Mr. MERRILL. I doubt whether they would.

Mr. FERRIS. Let us see about that.

Mr. MERRILL. Here is the State of California is the State of Nevada [indicating on map]. lines from a company which has plants in the State of California and which transmits and delivers to the State of Nevada, so that the lines cross the boundaries.

Mr. FERRIS. Do you not think the State of California could control rates in an instance such as you mention if so, which commission would control, the California or the commission in the State of California or the commission in the State of Nevada?

[241]

Mr. MERRILL. They both control; the State of California fixes the rates for the service rendered in the State of California, and the commission in Nevada fixes the rates for the service rendered in Nevada. They are doing it now.

Mr. FERRIS. Has any court passed upon the right of the State to fix rates on business initiated between States?

Mr. MERRILL. I cannot say whether they have or not, but the fact is that they are doing it. The situation obtains in the upper part of the State, where the commission lines cross the California-Oregon boundary.

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Mr. FERRIS. I thought that under the bill if the local authorities' power ceased the power of the commission would set in.

Mr. MERRILL. Yes. Assuming that this is interstate commerce in its clearest sense, the bill would not interfere so long as the Nevada commission was regulating everything in its State and the California commission was regulating everything in its State, unless the

* * That in cases of interstate transmission, so as the regulation is being exercised by the States concerned and there is no question of a quarrel or disagreement and the matter is not brought before the Federal commission, that the Federal commission will only keep hands off.

said (p. 68), was—

* on the theory that these are matters of local concern and should be handled by the locality when the locality will and can do it.

At the hearing (p. 99), Representative Doremus asked for his construction of the section “* * * re-fer jurisdiction that it vests in the commission to be applied to this act over interstate rates.” Mr. Merrill re-

plied his position on that is this—and that is what we intended to put into the bill—that in cases such as I mentioned yesterday, which are illustrated here [indicating map] where a transmission line runs across a State boundary and the same company serves customers in two or more States, that so long as the power of regulation of rates and of service is and can be exercised by the local authorities it had better be left with the local authorities. In any cases should arise where there is a disagreement between the authorities of two or more States over questions of rate or service regulations, and it could not be settled between those authorities, then it is intended that the matter may come before the commission for settlement.

Excerpt from the colloquy between Representative Doremus and Mr. Merrill indicates clearly that section 20 was passed at a time when the limits of state jurisdiction over sales of energy in interstate commerce were still to be determined (p. 101):

should be left with the local authorities, State commissions?

Mr. MERRILL. If they do it; and they are now. Similar questions were raised 4 years ago at the other hearings were held, and I do not feel competent to answer them. I know that the Federal Commission, for instance, is fixing the rates for power which is delivered from plants [242] in California; I do not know whether the question has ever come before the courts as to whether this business is or is not interstate commerce, or the meaning of the commerce clause of the Constitution, so that exclusive jurisdiction would be vested in the Federal Government, if it wished to exercise it.

Mr. DOREMUS. It might be a power which the States could exercise, or, if it failed to exercise it, could be in the jurisdiction of the State.

Mr. MERRILL. It is my judgment that so long as the matter is satisfactorily handled by the several States it should be left with them.

The *Attleboro* case, *supra*, however, changed the situation by declaring that the States could not authorize commissions to regulate interstate wholesale rates. This created a gap in the regulation except where interstate wholesale transactions were in licensed project power. Where licensed project power was involved in interstate commerce, this Commission had authority under section 20 because the States could not provide commissions with power to regulate rates therefor.

In 1935, Congress, in Part II of the present Act, closed the gap by extending this Commission's authority to regulate the sales¹¹ of electric energy in interstate commerce and to regulate the resale.

In view of the foregoing analysis, the failure of Congress to amend section 20, when it enacted Part II, is understandable. For, if Congress in 1935 believed that it had, in 1920, vested the powers of the States so as to permit them to regulate

ed section 20 to avoid conflict with jurisdiction conferred on this Commission under Part II. Instead, it left unchanged and unrepealed because still necessary to regulation of retail rates for interstate licensed project states which had failed to provide commissions with to regulate such rates, or where failure of State commission to agree on regulation would otherwise render such unworkable.

Whether our search has produced a reasonable interpretation of section 20 which avoids repeal by implication, or whether a conflicting part of that section be deemed repealed by implication, the finding that the States are unable to agree is a necessary condition precedent to our authority under section 20, for the rates here in question, being interstate rates held beyond the regulatory power of the States in the *Wabash* case, *supra*, the condition of section 20 would be satisfied. Our jurisdiction, therefore, would not be defeated by our finding that the States are unable to agree. Accordingly, we conclude that the States have no power under section 20 to regulate interstate wholesale rates of "public utilities" in conflict with our power under Part II. If we have jurisdiction not only under sections 205 and 206 of Part II, but also [243] under section 20 of Part I, on the basis of our finding that the States are unable to agree to regulate independently thereof.

*Does Safe Harbor have a vested right to have its rates regulated as prescribed by section 20?—*One other contention advanced by Safe Harbor in regard to jurisdiction should be considered.

Safe Harbor contends that it cannot be regulated under the provisions other than those in section 20, because its license to be a contract, and argues that the effect of section 20, which saves outstanding licenses from alteration, is that its license, issued subject to the provisions of the Interstate Commerce Act of 1920, is to protect the license from being altered by Congress without Safe Harbor's consent. It does not deny that the rate fixed by this Commission under section 20 is a contract.

agency, for that by another. The alteration opposed by the agency is one of procedure, and procedural changes may be effected without consent of the "licensee."¹²

Conclusion.—For the reasons stated, we find and affirm the jurisdiction to regulate Safe Harbor's interstate wholesale rates under section 20 of Part I and sections 205 and 206 of the Act. Safe Harbor's motion to dismiss for want of jurisdiction is, accordingly, to be dismissed, and we turn to the consideration of the rate to be fixed.

*

*

*

*

¹² *Pennsylvania Power & Light Co. v. Federal Power Commission*, 334 U. S. 445, cert. den. 321 U. S. 798; *Safe Harbor Water Power Co. v. Federal Power Commission*, *supra*.

IN THE
United States Court of Appeals

FOR THE NINTH CIRCUIT

PNIA ELECTRIC POWER COMPANY,
corporation,

Petitioner,

vs.

L POWER COMMISSION,

Respondent

OF MINERAL, State of Nevada,
ED STATES OF AMERICA,

Intervenors.

INTERVENOR MINERAL COUNTY'S
ANSWERING BRIEF

tion for Review of an Order of Federal Power
Commission.

FILED

FEB 18 1952

PAUL P. O'BRIEN
CLERK

L. E. BLAISDELL



IN THE
United States Court of Appeals

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ARNIA ELECTRIC POWER COMPANY,
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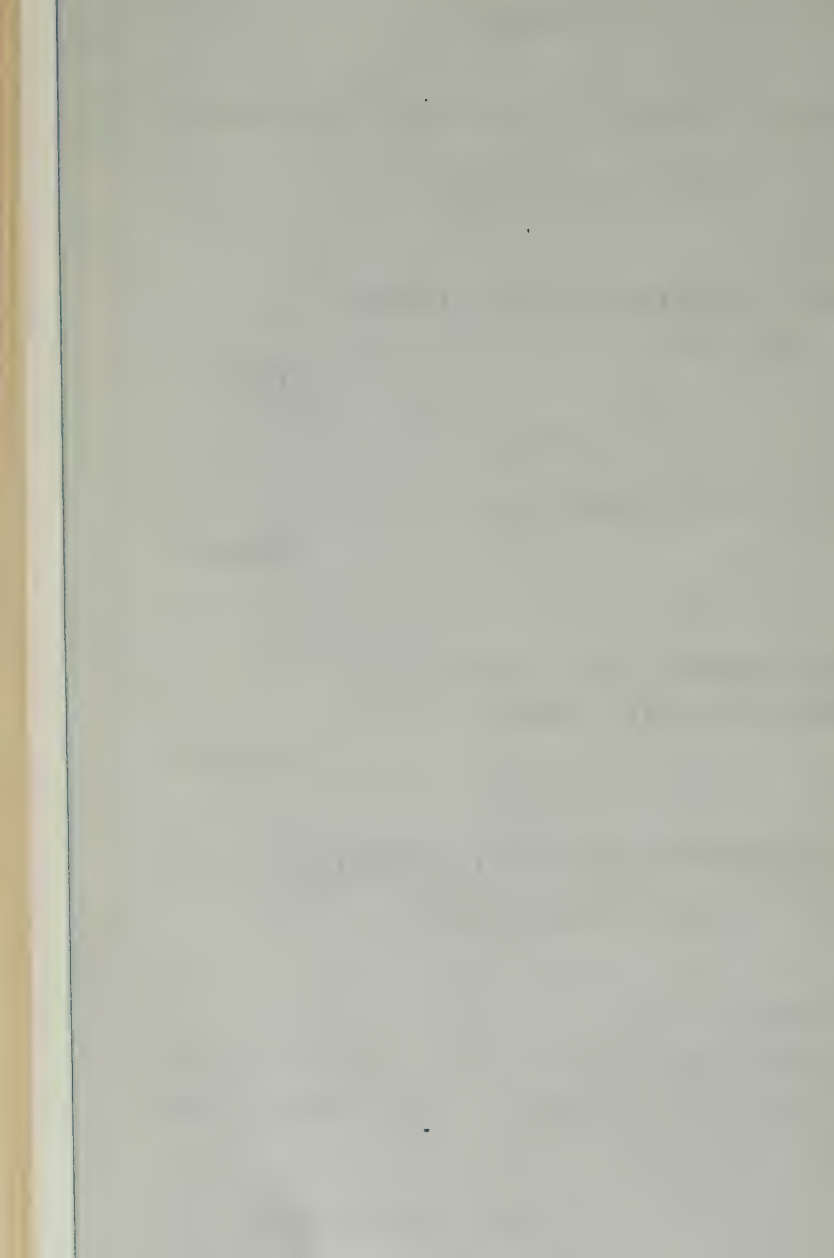
OF MINERAL, State of Nevada,
TED STATES OF AMERICA,

Intervenors.

INTERVENOR MINERAL COUNTY'S
ANSWERING BRIEF

al County, State of Nevada, intervenor, as and for
ring brief in the above entitled cause, hereby adopts
ering brief of the Federal Power Commission, and
ces the same herein by reference.

Respectfully submitted,



United States Court of Appeals
for the Ninth Circuit

CALIFORNIA ELECTRIC POWER Co., *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*

Petition for Review of the Federal Power Commission

FOR THE UNITED STATES AS INTERVENOR

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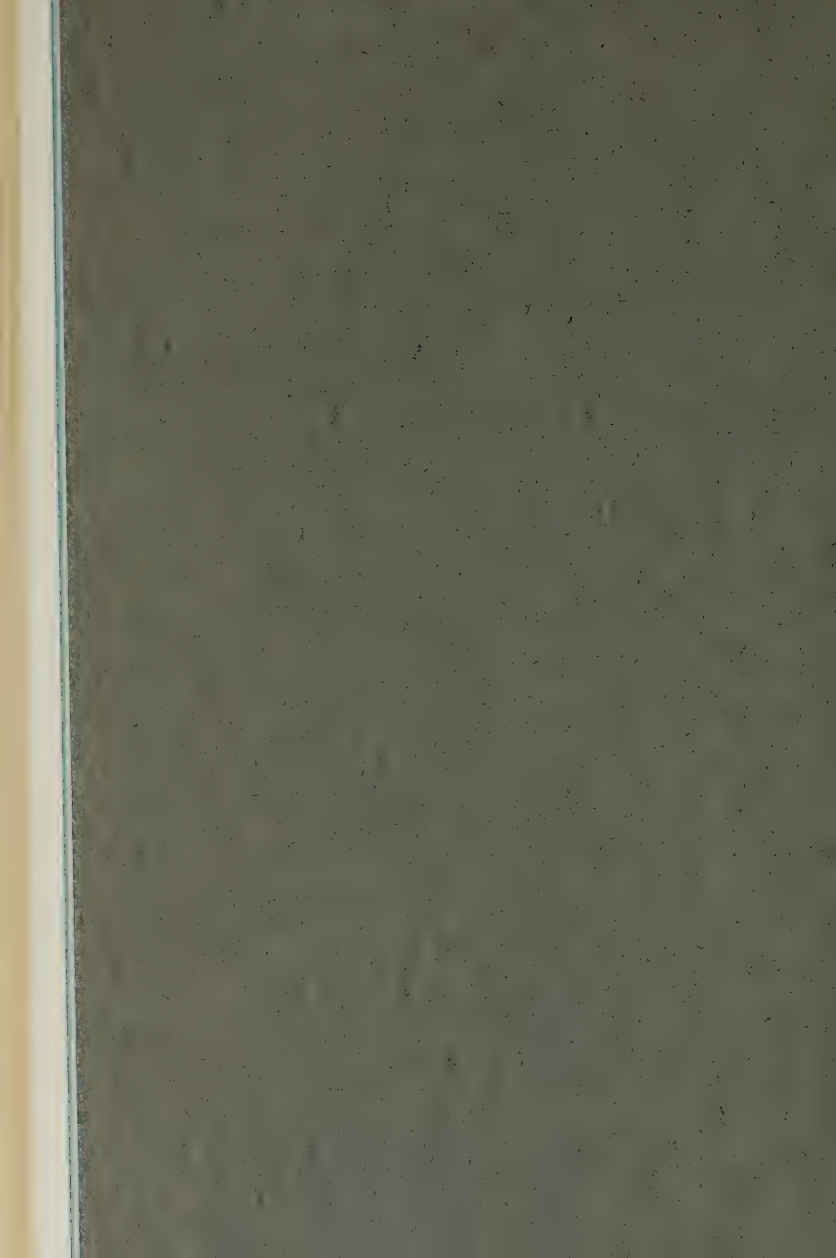
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Department of the Navy.

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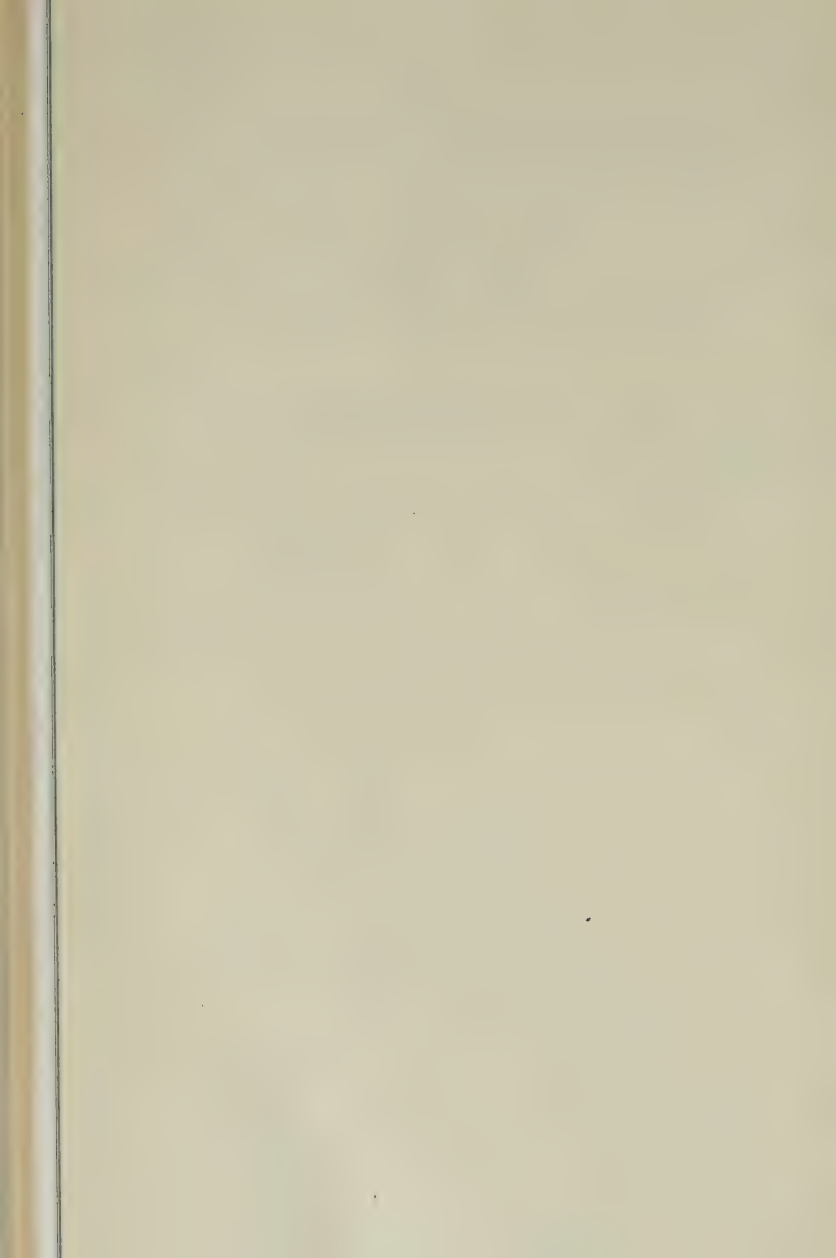
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United States Court of Appeals for the Ninth Circuit

No. 12987

CALIFORNIA ELECTRIC POWER Co., *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*

Petition for Review of the Federal Power Commission

FOR THE UNITED STATES AS INTERVENOR

STATEMENT

This petition for review filed under Section 304 of the Federal Power Act (49 Stat. 838, 860, 825^{el}(b)), petitioner seeks review of an order of the Federal Power Commission applying certain provisions of the Act to petitioner's rates for electric power which it sells to the United States through the Bureau of Yards and Docks, Department of the Navy, for use and resale at the Naval Ammunition Depot, Hawthorne, Nevada, as well as to Mineral Wells, Texas. (D. 822-242). This is a bill to

support of the Commission's order, will be on those aspects of the order relating to petition to the Naval Ammunition Depot.

Petitioner owns and operates an inter system for the generation and distribution of power in California and Nevada (R. 85, 174-175). Power sold to the Navy (and to Mineral County) is generated in and transmitted from petitioner's so-called Northern Division plants in California. The electric energy sold to the Navy is delivered through Navy-owned transmission lines and metered at petitioner's Mill Creek plant substation in Mono County, California (R. 86, 104, 190-197). From there it flows through the Navy-owned transmission lines across the California-Nevada state boundary to the Navy Yard at Hawthorne.

The electric energy which is delivered to the Navy (and to Mineral County) at Mill Creek is derived from three sources. Most of it comes from petitioner's three plants in its so-called Mono Basin system: Poole, Rush Creek, and Mill Creek plants. The Rush Creek plant transmits power to petitioner's Leevining substation, whence it flows over a 50-mile transmission line to the Mill Creek substation, where it is delivered to the Navy and Mineral County (R. 107). The output of the Mill Creek plant is also delivered at the Mill Creek substation. The three Mono Basin plants are all hydroelectric projects licensed by the Federal Power Commission under Section 1 of Part I of the Federal Power Act (41 Stat.

17% of the energy supplied to the Navy and to Mineral County originated in these three plants (R. 86,

at certain times of year when the output at Mono is insufficient to meet the needs of the Navy and Mineral County, the remainder is supplied from two sources: (1) energy purchased by petitioners from the Owens River plants of the City of Los Angeles which are interconnected with petitioner's main 110,000 volt Northern Division transmission line, running from Mill Creek to Leevining substation; (2) energy supplied at five hydroelectric plants owned by petitioner in Inyo County, California, known as the Bishop plants, four of which are operated under licenses from the Federal Power Commission. The flow is from Mill Creek over the 110,000 volt main transmission line to Leevining substation, a distance of about 60 miles, and from Leevining over the 55,000 volt line to every point at Mill Creek. In 1949 about 10.7% of the energy supplied to the Navy and Mineral County came from the Owens River source and about 4.6% from the Bishop Creek plants (R. 86, 190-222, 333-349). Most of the energy sold to the Navy flows over the 55,000 volt line from Leevining to Mill Creek, and the remainder flows through the sixty mile main transmission line from Bishop Creek to Leevining (R. 107,

and switching facilities at Mill Creek are owned by petitioner (R. 86, 107, 190-197). The Navy and Mineral

County each owns a 55,000 volt transmission line from Mill Creek to its own distribution points in the County (R. 86, 107, 182). At Hawthorne, the energy is transformed to lower voltages for distribution (R. 107, 182). In addition to the electric energy purchased from petitioner, the Navy generates a small part of its energy needs on three diesel generators located at the Depot. In 1949 the amount of power so generated was equivalent to 7.5% of the power purchased from petitioner (R. 89-90).

The power purchased or generated by the petitioner is used to supply the electric energy needs of the occupants of a housing project, which was built for and occupied by civilian employees of the Depot and for the energy needs of the operators of the Depot and of the various concessions. In addition, it is used to operate the Navy's various facilities at the Depot. Each housing business unit has a separate meter, and the amount thereof is billed, and required to pay, for the electric energy which he consumes (R. 90, 270-279, 539-554). From 1943 to 1949 between 15.4% and 28.6% of the yearly total power supply was resold to these housing and business concessions, the amount resold being the average 18.7% of the yearly total (R. 87, 561).

By a contract, dated July 1, 1943, which was terminable on sixty days' notice, petitioner and the Navy agreed upon the rates to be charged for the electric energy furnished by petitioner (R. 89, 165, 204, 404). Petitioner's schedule of rates

Commission of California, seeking a rate in respect of certain designated customers whom it was serving under special contracts (R. 90, 412-414). The California Commission conducted a hearing which resulted, in July, 1948, in a decision that rate increases under petitioner's various contracts (R. 167, 412-509). Among them was so-called "P-2—Power—Wholesale General Service" (R. 85), which schedule petitioner at this time applied to the Navy. Invoking its sixty-day review provision, petitioner attempted to terminate its contract with the Navy. It continued to supply power, but sought to bill the Navy at the rates in the new P-2 schedule (R. 90, 307, 558-560). The Navy denied that this new P-2 schedule was applicable to the sales to it on the ground, among others, that the California Commission lacked jurisdiction to fix the rates for these sales (R. 90, 7-8), and in August, 1949, applied to the California Commission for a determination that the P-2 schedule was applicable to these sales.

Petitioner's application was pending for hearing when the Commission instituted the present proceeding. The Power Commission and the California Commission agreed on a joint hearing, in accordance with the rules of the Power Commission (R. 7-8, 91). After the joint hearing, at which staff counsel of both Commissions as well as the petitioner were represented, and Mineral County and the Navy intervened as parties (R. 12-24), the Power Commission determined

directed petitioner to file the 1945 contract schedule and to charge the rate there specified and unless * * * duly superseded" by new rates the Company might file in accordance with the Commission's Rules and Regulations (R. 84-112). Petitioner, on June 21, 1951, after denial of its application for rehearing (R. 113-144, 146-148), filed this application for review (R. 623-646). The United States, the Department of the Navy, and Mineral County moved to dismiss and this Court has granted these motions (R. 647-650).

QUESTIONS PRESENTED

Basically, the issue presented by this case is whether the Federal Power Commission has jurisdiction to regulate the rates charged by petitioner for the sale of electric energy to the Navy.

Specifically, the questions are:

1. Whether the Power Commission has jurisdiction to regulate these sales under Section 20 of the Federal Power Act (relating to licensee's jurisdiction on the ground that the energy is sold in interstate commerce and that the two states involved have been "in agreement", within the meaning of Section 20, to regulate the rates for these sales.

2. Whether these sales are sales for resale in interstate commerce, subject to the Power Commission's rate regulation jurisdiction under Sections 20 and 21 of Part II of the Federal Power Act relating to "public utilities."

regulation under Part II, by virtue of the fact
itioner is a licensee subject to regulation by
under Section 20.

STATUTES INVOLVED

Provisions of Part I of the Federal Power Act
ely involved are as follows:

c. 20. That when said power or any part
of shall enter into interstate or foreign com-
e the rates charged and the service rendered
ny such licensee, * * * or by any person, cor-
ion, or association purchasing power from
licensee for sale and distribution or use in
e service shall be reasonable, nondiscrimina-
and just to the customer * * * and whenever
of the States directly concerned has not pro-
d a commission or other authority to enforce
requirements of this section within such State
or such States are unable to agree through
properly constituted authorities on the ser-
to be rendered or on the rates or charges of
ment therefor, * * * jurisdiction is hereby con-
d upon the commission * * * upon its own
ative to enforce the provisions of this section,
regulate and control so much of the services ren-
d, and of the rates and charges of payment
for as constitute interstate or foreign com-
e * * * .

Provisions of Part II of the Power Act im-

for ultimate distribution to the public with a public interest, and that Federal matters relating to generation to the provided in this Part and the Part next following of that part of such business which consists in the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the interest, such Federal regulation, however, shall be limited only to those matters which are not subject to regulation by the States.

(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy which may deprive a State or State commission of the authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission of electric energy, but shall not have jurisdiction except as specifically provided in this Part and the Part next following, over facilities used in the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce. The Commission shall have jurisdiction over facilities for the transmission of electric energy consumed wholly by the transmitter.

commerce if transmitted from a State and
received at any point outside thereof; but only in-
sofar as such transmission takes place within the
United States.

) The term "sale of electric energy at whole-
sale" when used in this Part means a sale of
electric energy to any person for resale.

) The term "public utility" when used in this
Part or in the Part next following means any
person who owns or operates facilities subject to
the jurisdiction of the Commission under this Part.

) No provision in this Part shall apply to, or
be deemed to include, the United States, a State
or any political subdivision of a State, or any
agency, authority, or instrumentality of any one
of the foregoing, or any corporation which
is wholly owned, directly or indirectly, by any one
of the foregoing, or any officer, agent, or
employee of any of the foregoing acting as such in
the course of his official duty, unless such provision
contains specific reference thereto.

SEC. 205. (a) All rates and charges made, de-
manded, or received by any public utility for or in
connection with the transmission or sale of electric
energy subject to the jurisdiction of the Commis-
sion, and all rules and regulations affecting or per-
taining to such rates or charges shall be just and
reasonable, * * * .

(c) * * * every public utility shall file
Commission, * * * schedules showing all r
charges for any transmission or sale subje
jurisdiction of the Commission, * * * .

(d) Unless the Commission otherwise o
change shall be made by any public utiliti
such rate, charge, classification, or servi
any rule, regulation, or contract relating
except after thirty days' notice to the Cor
and to the public. * * *

SEC. 206. (a) Whenever the Commissio
a hearing had upon its own motion or up
plaint, shall find that any rate, charge, c
fication, demanded, observed, charged, or
by any public utility for any transmission
subject to the jurisdiction of the Commi
that any rule, regulation, practice, or
affecting such rate, charge, or classificati
just, unreasonable, unduly discrimina
preferential, the Commission shall deter
just and reasonable rate, charge, class
rule, regulation, practice, or contract to b
after observed and in force, and shall fix
by order.

ARGUMENT

It is our position that the Power Commis
jurisdiction in this case under both Part I and
of the Federal Power Act to regulate the rates
by petitioner for its sales to the Navy. Jun

is derived from the Federal Water Power Act of June 10, 1920, c. 285, 41 Stat. 1063, which dealt with the granting of licenses to enterprises for the construction and maintenance of hydroelectric projects on public lands and waters, imposed various requirements on the grant as a condition of the grant. One of these requirements was that the sale of the power generated by such projects be subject to rate regulation under Sections 19 and 20. These Sections left the rate regulation prescribed to the states, but went on to provide that in the event that the states concerned should fail to afford adequate regulation, regulation should be provided by the Federal Power Commission. Section 20 deals with the sale of energy sold in interstate commerce, and is the section here involved. The basic scheme of the section is to permit joint regulation by agreement among the states concerned if they are able to reach an agreement. If, however, any of the states concerned fails to provide regulatory machinery or, if provided such machinery, is unable to reach an agreement or operating agreement with the other states concerned, jurisdiction is conferred on the Federal Power Commission.

In the instant case, the Federal Power Commission has found that the power which petitioner generates at its hydroelectric projects and which it sells to the Navy is sold in interstate commerce. In addition, the Commission has found that Nevada has failed to provide a commission

with the California commission. We believe the rulings to be correct and consequently that the Commission properly concluded that it had jurisdiction over these rates under Part I of the Act. Part I, *infra*, develops our position in detail.

We also think that, aside from the question of jurisdiction under Part I, Sections 205 and 206 of the Act, the Commission has no authority to confer rate regulatory jurisdiction on the Public Utilities Commission. Part II was enacted in 1935 as Title II of the Public Utilities Act of 1935. Act of August 1935, c. 687, Title II, 49 Stat. 837, 847. Part II proceeded under a scheme different from that of the Federal Water Power Act, which, as amended, was enacted as Part I of the Federal Power Act. Part II was aimed at regulation of the transmission of electricity at wholesale in interstate commerce without reference to the manner of its generation. Part II was not intended to oust the states of their jurisdiction, which the Supreme Court had held they could exercise until forbidden by Congress, to regulate rates for retail sales of electricity, even though such sales were in interstate commerce. *Pennsylvania Gas Co. v. Public Service Commission*, 252 U.S. 23. But other decisions of the Supreme Court had made it clear that, under the commerce clause of the Constitution and in the absence of congressional inaction, the states were authorized to regulate wholesale sales of electricity in interstate commerce (*Public Utilities Commission v. Attleboro Co.*, 273 U.S. 83; *Missouri v. Kansas*, 265 U.S. 298).

interstate sales in the Federal Power Com-

instant case, the Power Commission has held
eive properly—that petitioner's sales to the
re wholesale sales (sales for resale) in inter-
merce and hence subject to the Power Com-
rate jurisdiction under Part II of the Act.
e terms of the Act on which jurisdiction is
not without ambiguity, judicial construction
t, as well as its legislative history, makes clear
ctness of this result, as we show at length in
infra.

ner not only denies that these sales are covered
II but, in addition, contends that, since these
of power generated at licensed projects, the
hich the states may, if they can, regulate under
ese sales are in no event subject to regulation
rt II by the Power Commission. We show in
[, *infra*, that this contention is without merit
ecently been rejected by the Courts of Appeals
other circuits. *Safe Harbor Water Power*
TPC, 179 F. 2d 179 (C.A. 3), certiorari denied,
957; *Pennsylvania Water & Power Co. v.*
. F. 2d (C.A.D.C. July 3, 1951), certio-
ted February 4, 1952.

1. The Sales to the Navy Are Regulable by the Federal Commission Under Part I of the Federal Power Act because They Are Sales in Interstate Commerce, Not Provided a Commission With Power to Regulate Sales, and California and Nevada Are Unable to Agree on Terms of Regulation.

Section 20, Part I, of the Federal Power Act provides an integrated plan for state and federal regulation of rates for power generated on federally owned projects, whenever this power enters interstate commerce. State and federal jurisdiction are concurrent under this section, but are mutually supplementary. When state regulation is inoperative, federal control takes effect.

The conditions under which state regulation is operative may be either legal or practical. The legal condition arises when one of the states has failed to provide by law for a regulatory agency. The practical condition arises when, although the states have provided regulatory agencies with appropriate authority, these agencies are unable to agree on rates and terms of service.

We shall show that federal regulation is proper in the circumstances of this case, because (a) the power sold by petitioner to the Navy is in interstate commerce and (b) state regulation is inoperative, owing to (1) the failure of Nevada to provide a commission with jurisdiction over sale of this type, and (2) the inability of California and Nevada to agree.

initial applicability of Section 20 depends, by
, on whether the licensed power enters inter-
commerce. We think it is clear beyond question
power bought by the Navy does pass in inter-
commerce. The power is generated in petitioner's
Northern Division plants, or, in part, pur-
from the City of Los Angeles. Much of it flows
ts of petitioner's main transmission line from
Creek to Leevining. All of it flows over some
the 55,000 volt line from Leevining to Mill
here it is switched to the Navy lines and passes
n into Nevada.

s a journey in interstate commerce. Indeed
t of the journey alone which takes place on
r's lines is in interstate commerce, for it is
led that one who transports a commodity on
ion of a journey over state lines is transport-
interstate commerce, even though that portion
ourney takes place wholly within one state.
e *Daniel Ball*, 10 Wall. 557. Ownership of the
sion lines at the state border is immaterial.
k that the decisions in *Jersey Central Power*
Co. v. FPC, 319 U.S. 61, and in *FPC v. East*
s Co., 338 U.S. 464, holding that electric and
panies operating wholly within single states
ng power transmitted across state lines are in
e commerce, are controlling in this aspect of

that one of the purchasers is the Government, free petitioner from regulations otherwise applicable. It is petitioner, not the Government, who is regulated. Cf. *Penn Dairies v. Milk Control Bd.*, 318 U.S. 261. Furthermore Section 201(c) of the Act defines energy as transmitted in interstate commerce if it is transmitted from a state to any point outside the state. This definition, which is merely a restatement of the judicially established definition of interstate commerce, obviously covers petitioner's sales to the Navy.

B. Nevada Has Not Provided a Commission With Power to Regulate the Sales to the Navy; In Any Event, Nevada and California Have Been Unable to Agree Over Regulation of These Sales

It is clear, therefore, that Section 20 is the applicable section of the Act.² Section 20 provides, in appropriate circumstances, for either federal or state regulation. We think that federal regulation is appropriate in this case. Under Section 20 federal regulation is operative when either of two events occurs: (1) whenever any of the states directly concerned has failed to provide a commission or other authority to enforce the requirements of such section within such state, or when "such states are unable to agree through their properly constituted authorities on the service to be rendered or on the rates or charges of payment therefor."

² Petitioner contends that Section 19 is applicable, but petitioner's project licenses incorporate the provisions of Section 19 (Spec. of Exam. 1). But it is equally clear that Section 19

has no duly constituted commission with any power to regulate wholesale rates, even within Nevada. Moreover, even if the Public Service Commission of Nevada had such power, it has evinced and acted upon its belief that it lacked this power. This belief, acted upon, amounts to an "inability to agree" within the meaning of the statute.

The Public Service Commission of Nevada has no authority to regulate petitioner's sales to the Navy. It is clear in the first place from a mere reading of the statutes defining the jurisdiction of the Public Service Commission, Nev. Comp. L. (1929) § 6100, *infra*, p. 35. The Public Service Commission is without jurisdiction over "public utilities." Nev. Comp. L. (1929) § 6100, *infra*, p. 35. "Public utilities" are defined to include plants within the state distributing electricity, Nev. Comp. L. (1929) § 6106, *infra*, p. 35. If petitioner is not within the state, it is not within the jurisdiction of the Nevada Commission.³ Significantly, however, the Nevada statutes expressly exempt sellers at wholesale from the jurisdiction of the Public Service Commission. Section 6147 of the Compiled Laws, *infra*, p. 36 authorizes public utilities to purchase electricity from other suppliers, and Section 6148, *infra*, p. 36 subjects the purchase contracts to the jurisdiction of the state commission. But Section 6149 of the Compiled Laws, *infra*, p. 37 expressly provides that in no circumstances shall a seller be deemed to be a public utility or be subject to the jurisdiction of the Nevada Commission.

This case submit, conclusively indicates that has provided no commission with power to administer the provisions of Section 20 of the Federal Power Act as they apply to petitioner's sales of power to the public. Since the Navy resells part of the power it buys from petitioner, as we show at length, *infra*, pp. 21-22, petitioner is in the position of a wholesaler exempted from Nevada law, from the jurisdiction of the Nevada Public Service Commission.

2. As we have indicated, the failure of Nevada to endow its Public Service Commission with authority to regulate wholesale dealings in power is insufficient to bring petitioner within the ambit of federal jurisdiction. But the second condition of Section 20, making federal control appropriate, has also been met for the California and Nevada Commissions have been unable to agree on rates. FPC so found, and its finding, being supported by substantial evidence, may not be controverted in this Court. *Universal Camera Corp. v. NLRB*, 340 U.S. 474; *FPC v. Hope Natural Gas Co.*, 320 U.S. 591.

The Nevada Commission never undertook regulation jointly with California. The Chairman of the Nevada Commission was present at the hearing below, but refused to enter an appearance (R. 153-154). The Nevada Commission was given an opportunity to be a party to the joint hearing, as the Nevada laws require (Nev. Comp. L. (Supp. 1941) § 6167.12), but it declined this opportunity, stating that Nevada preferred to await the outcome of the hearing below (R. 155).

to the Nevada Public Service Commission, in that the Nevada Commission had no power es charged by municipal corporations (R. 186-514). The fair inference from this evidence, ss of the correctness of the opinion expressed that the Nevada Commission believed itself ss to act in this case; and, because it believed powerless, it never undertook joint regulation ilifornia.⁴ For this reason, also, petitioner's a subsequent opinion of the Attorney General, ng that the Nevada Commission had jurisdic-retail rates, is immaterial (R. 126-131). The goes to the Nevada Commission's state of nd this does not appear to have changed.

s posture there was a clear inability to agree e meaning of Section 20. As the Third Circuit d in *Safe Harbor*, commencement of negotia-not a prerequisite of a failure to agree; it is that time passes without any effective joint *Safe Harbor Water Power Corp. v. FPC*, 179 9, 191-192 (C.A. 3). Moreover, events subse- the commencement of proceedings for fed- ulation by the Power Commission may be ed in determining that no agreement can be 179 F. 2d at 192. In this case, no steps have ten toward agreement since 1949, when these gs were instituted. These considerations, we

evidence deals with the question of agreement over the ounty rates and is silent over the Navy rates, but we think

submit, point conclusively to a default by the
concerned, so that the jurisdiction of FPC has
while attached under Part I of the Act.⁵

II. The Federal Power Commission Has Jurisdiction Over Wholesaler's Sales to the Navy Under Part II of the Act inasmuch as These Sales Are Sales for Resale in Interstate Commerce.

Part II of the Act provides an independent basis for
FPC jurisdiction to require the filing of petition rates.
Part II was enacted to create jurisdiction over
sales at wholesale in interstate commerce. One of the
purposes of this enactment was to fill in the gap in
public utility regulation created when the decision in
Public Utilities Commission v. Attleboro Co., 284 U.S. 286,
1931, 83, denied to the states the power to regulate in
wholesale transactions. See Sen. Rep. No. 62, 73d
Cong., 1st Sess., pp. 17, 48; H. Rep. No. 131, 73d
Cong., 1st Sess. p. 7; *Connecticut Light & Power Co. v. FPC.*,
324 U.S. 515, 525-527; *Jersey Central Electric Co. v. FPC.*,
319 U.S. 61. On the other hand, the Act reserved to the states their control over
retail sales, even though the sales were in interstate
commerce. *Connecticut Light & Power Co. v. FPC.*

⁵ It may be pointed out that, with respect to wholesale sales, the
only possible state regulation is regulation by agreement between the
states concerned. The Constitution forbids unilateral action by
either state in the wholesale field. *Missouri v. Kansas Gas & Electric Co.*,
282 U.S. 298; *Public Util. Comm. v. Attleboro Co.*, 273 U.S. 83. The
readiness of the California Commission to act is manifest in
this case. In the retail field an area remains in which a state
is free to regulate that part of an interstate operation which

On this background in view, it is possible to remove the textual ambiguities in Part II, and it clearly appears that petitioner's sales in this case are regulable under Part II. This is precisely the kind of transaction that is exempt from state regulation and that Part II was meant to reach. We shall show in this section that these sales fall within the terms of Part II. In the following section, Point III, *infra* pp. 27-33, we shall show that the fact that these sales are of power generated at projects licensed under Part I does not remove them out of the operation of Part II.

Petitioner's Sales to the Navy Are Sales for Resale in Interstate Commerce.

The provisions of Part II granting the Power Commission the authority to regulate rates and to compel filing of schedules are Sections 205 and 206. These sections apply to "any * * * sale [by a 'public utility'] within the jurisdiction of the Commission". Petitioner concedes that it is a "public utility",⁶ and under Sections 201 (b) and (d) conjointly, the Commission's jurisdiction embraces sales of electric energy for resale in interstate commerce.

It is clear that petitioner's various Mono Basin facilities are used for *transmission* in interstate commerce, the first of the three bases of jurisdiction set forth in Section 201(b). Section 201(b) defines such transmission as transmission from any point within a state to any point outside that state. This alone would give the Commission jurisdiction over these facilities and peti-

Since we have shown above, *supra*, pp. 15-16, sales to the Navy are in interstate commerce (*Central Power & Light Co. v. FPC*, 319 U.S. 6 v. *East Ohio Gas Co.*, 338 U.S. 464) it remains shown that these sales are sales at wholesale. V to that now.

Section 201(d) defines sales at wholesale as any person for resale. On the average, some 1 each year's supply of energy was resold by th to the business concessionaires and the occupan public housing at the Hawthorne Naval Depot tricity so sold to each such consumer is sep metered and each consumer is billed and is req pay for the energy he consumed. To the extent energy so delivered came from petitioner, peti sales to the Navy were obviously for resale.

Petitioner contends that because the between it and the Navy did not mention these the transaction cannot be regarded as a sale fo (Pet. Br. p. 67). But, it is clear that petiti aware of these resales (See R. 560, 305-307) enough that the sales be made with knowledg uses to which the power was to be put; it is no sary that the purposes of the sale be set ou contract. The sales were "made with a view * * * resale." See *Kalem Co. v. Harper Bros.*, 2 55, 62; cf. *Hartford Electric Light Co. v. FPC* 2d 953, 958-960 (C.A. 2) Certiorari denied, 3 741.⁷ After all, the Power Commission's juri

dent upon the facts as they exist, and not upon
s used in contractual agreements which can be
to fit the whims or desires of either party.
oes it detract from the wholesale nature of pe-
s sales that not all of the energy purchased was
It is enough that any part of the power sold
resale. See *Connecticut Light and Power Co.*
324 U.S. 515, 520-521, 536.⁸ Reference to the
ve purpose of "filling the gap" left by the *At-*
case eliminates any problem arising from the
mixed uses of the energy. In *Attleboro* the
ed the interstate energy both "for its own use
sale". 273 U.S. at 84. Thus such mixed sales
thin the "gap" left by that case, and it follows
gress meant the statute to cover them.

**es to the Navy Do Not Come Within Any of the Excep-
tions of Section 201.**

itioner urges that its sales to the United States
sales at wholesale within the meaning of the
ause Section 201(d) defines sales at wholesale
o any *person* for resale, and the United States
person. This contention it seeks to support by

ver Commission's finding that the sales were at wholesale.
reasonable inference from the evidence; and, the Power
n having drawn this inference on the basis of substantial
he finding should not be set aside.

o not find that Congress has conditioned the jurisdiction
mmission upon any particular volume or proportion of
energy involved, and we do not think it would be approp-
rual, and the jurisdictional limitation does not constitute

reference to Section 3(4) and Section 201(2) of the latter of which says that the provisions of Part II do not apply to the United States, a state, or a political subdivision of a state, or other governmental body.

The argument is specious. The exemption of the United States is from the regulatory burdens of the Act, not from such rate benefits as may accrue from the regulation of petitioner's rates. In such an exemption means only that the United States is not to be deemed a public utility. The "provisions" referred to in Part II, from which governmental bodies are exempted, are the provisions for regulation of public utilities. The thrust of the Act is toward regulating the seller at the wholesale, and not the buyer. The United States is not only the buyer of the wholesale power.

This view is supported by several considerations. First, the contrary reading urged by petitioner is not consistent with other provisions of the Act. For example, Section 306 allows "any person, State, political entity, or state commission" aggrieved by any action of a licensee or public utility to apply to FPC for redress. This indicates that the benefits to buyers of the regulation under Part II must accrue to governmental bodies as well as to private persons—the exact position which petitioner's argument attempts to maintain.

The verbal problem presented by this contention of petitioner's can give no real difficulty, so long as it is recognized that the entire thrust of Part II is toward regulating public utilities. What is a public utility? It is defined in Section 201(e); Section 201(f) defines

ances where the United States sells electricity, its rates are not regulable by FPC under But none of these provisions bears any relation to purchases by the United States. The Act was not aimed at this aspect of the transaction.⁹

Petitioner also argues that its California facilities in the interstate transmission and sale to California, are also used for "local distribution" in California and are therefore exempt under Section 201(b), which excepts facilities used in local distribution (Pet. 8). The fallacy in this argument lies in the definition of "local distribution." We think it is clear that distribution in this provision means no more than sale of energy at retail, and the transmission facilities involved which, as we have shown *supra*, are used for transmission of energy in interstate commerce, are obviously not used solely for local distribution.

Particular facilities which petitioner asserts are used for local distribution consist of the 55,000 volt transmission line from Leevining to Mill Creek (See R.

The court has consistently construed the word "person" in Section 201(f), including governmental bodies, despite the exemption in Section 201(f), and the definition of "person" in Section 3(4) of the Act, *i.e.*, "an individual or a corporation"). Thus, sales at public utilities to municipalities have been held regulable. *Otter Tail Power Co.*, 2 F.P.C. 134; *Los Angeles v. Nevada-California Electric Power Co.*, 2 F.P.C. 104; *Otter Tail Power Co.*, Opinion No. 186 (Nov. 1950); *Michigan-Wisconsin Power Co.*, Opinion No. 213 (May 1951); *Interstate Light & Power Co. & Wisconsin Power & Light Co.*, Opinion No. 215 (July 12, 1951). This consistent ad-

116). This Leevining-Mill Creek line, which, as recalled, serves the Navy and Mineral County Mill Creek, is also used as a "general service" line from which power is apparently tapped to serve the towns of Bridgeport, Leevining, Garbutt Mine, and the summer resort of June Lake (R. 181; see also p. 62). While there is no evidence in the record of closing what local connections are involved in providing the service to these communities, it is clear that the connections must involve tap lines from the 55,000-volt line, and transformers which step down the voltage to a level usable in distribution to private customers. The power cannot be distributed directly into homes at the very high long-distance transmission voltage of 55,000 volts.

This fact is crucial, as was held in *FPC v. Elgin Gas Co.*, 338 U.S. 464. The Supreme Court there

But what Congress must have meant by "local distribution" was equipment for distributing gas among consumers within a particular local community, not the high-pressure transmission lines transporting the gas to the local market. (338 U.S. at 469-470)

The situation is analogous here. This is clearly the legislative purpose of providing federal control over the point where the Constitution permits state regulation to begin—the retail level. This is the "filling the gap" purpose of the Act. It is clear that, in

California could not, under the *Attleboro* regulate it, to the extent that it is used in conjunction with transmission or sales for resale in interstate commerce, and hence it falls within FPC jurisdiction. See also *Connecticut Light & Power Co. v. U.S.* 515, 534.

reference to the legislative purpose of "filling" also reveals the error in petitioner's further contention that it is exempted by the proviso that Part I not deprive a state of "its lawful authority exercised" over interstate transportation of energy. Petitioner's argument is that California has lawful authority under Part I of the Act, because petitioner is a licensee under Part I, and Section 20 gives authority over it. But, under the doctrine of *Attleboro*, California has no "lawful authority" over wholesale interstate sales. Its authority is limited to retail. It may be that it has authority jointly with Canada by agreement; but, as we have shown, in 16-20, this authority is not "now exercised." Therefore, the purpose of the proviso against interstate regulation was simply to reemphasize the aim of restricting the application of Part II to wholesale, leaving retail rate regulation where it always been, in the hands of the states. No exemption was intended for those having licensee status under Part I.

Fact That the Energy Sold Is Generated at Projects Licensed Under Part I Does Not Operate to Exempt the

because the power so sold is generated at projects licensed under Part I.¹⁰ The argument seems to be because the power is generated at projects under Part I, the sales thereof are subject by Section 20 to future state regulation—when they can agree—and that this type of regulation is consistent with rate regulation by the Power Commission under Part II; further, that since the legislative scheme of the Act is based on deference to the state, the inconsistency must be resolved in favor of state regulation under Part I.

1. This argument has been considered in great detail and has been rejected in even broader aspects by the Courts of Appeals. *Safe Harbor Water Power Co. v. FPC*, 179 F. 2d 179 (C.A. 3), certiorari denied, 353 U.S. 957; *Pennsylvania Water & Power Co. v. FPC*, 350 U.S. 106 (1956).

350 U.S. 106 (1956), 179 F. 2d 179 (C.A.D.C. July 3, 1951), certiorari granted February 4, 1952. The principles announced are fully applicable in this case. The fallacy in petitioner's position is its failure to recognize that a company may be both a licensee under Part I and a public utility under Part II. We have said in the preceding sections, that this is the situation in this case.

The qualifications for a licensee under Part I for the production of electric energy in licensed projects on public lands or navigable streams, are quite independent of those for a public utility under Part II.

¹⁰ Even if petitioner were correct in this contention, the result would not be improved, unless it were able to show that

sion or sale at wholesale of electric energy in
e commerce. A company and its activities,
rly, as here, sales at wholesale in interstate
e of electric energy generated at a licensed
may be subject to regulation under Part I or
or both. If it happens to be both as is the fact
s is coincidental.

ess recognized this possibility. It also recog-
t regulation of a company which was both a
ility and a licensee could take place under Part
ll as Part I. Thus, the House Committee, in
with certain administrative provisions of Part
ned it unnecessary to use both terms—licensee
ic utility—in a provision that was to apply to
who happened also to be public utilities. The
as that, if they qualified as public utilities, they
ered, whether or not they were also licensees.
ep. No. 1318, 74th Cong., 1st Sess., p. 31. Also,
sman of Part II, Dozier DeVane, Solicitor of
explaining the relationship of Part II to the
er of the Public Utilities Act of 1935, pointed
“among the operating companies”—i.e., pub-
es—were a number of licensees under Part I.
hearings before Senate Committee on Interstate
ce on S. 1725, 74th Cong., 1st Sess., pp. 233-234.
lear, therefore, that a company and its activ-
y be subject simultaneously to the regulatory
ments of both Part I and Part II. We recog-
t, in a particular circumstance, this might

rate regulation by the states results in an order consistent with a Power Commission order in rates under Part II.

From this potential inconsistency petitioner concludes that there is an implied exemption of from Part II. But the conclusion is not warranted. When Part II was passed in 1935, Part I was amended and reenacted. Act of August 26, 1935, c. 687, § 863. Obviously the two Parts should be read together with an attempt to construe them consistently if possible. And in the circumstances of this case there is no inconsistency. In this case, as we have stated *supra*, pp. 14-20, petitioner's rates for its sale to the Navy are not subject to state regulation under Section 20. Under Section 20, by virtue of Nevada's failure to provide a commission with power over wholesale rates and by virtue of Nevada's failure to agree with California, the Power Commission has jurisdiction to fix petitioner's rates to the Navy so that there can be no inconsistent orders. Inconsistency cannot arise if the states are prepared to agree on regulation under Section 20 and actually issue rate orders under that section. Until that happens it is not necessary to determine whether the statute is internally inconsistent.

¹¹ As the Third Circuit pointed out in *Safe Harbor*, even if the states should undertake to regulate petitioner's rates under Section 20, this by no means assures an inconsistency, because the standard for fixing rates is substantially identical under Section 20 and under Part II. Under Section 20 rates must be "reasonable, nondiscriminatory, and just," while under Section 206 rates must be "reasonable, nondiscriminatory, and just." The

in the foregoing it is clear that there is no inconsistency between Part I and Part II of the Act, as in this case. But even if the Court should feel the possibility of future conflicting state and federal laws renders the statute internally inconsistent, and that the potential inconsistency must be resolved, the correct resolution is not by construing the statute to exempt licensees from federal control. The proper approach is rather to read Section 20 to exclude public utilities from state control. Once again reference to the legislative history supports this conclusion. The original enactment of Section 20 without amendment in 1906, as in the *Attleboro* case, implies that Congress did not intend to extend state regulation under Section 20 to public utilities—that is, to rates charged by public utilities.” *Attleboro*, which was decided 17 years after the original enactment of Section 20, affirmed state jurisdiction to the states, and if Congress had intended to reopen it, Congress would have done so by amending the section. Thus far, in this brief, we have assumed for the sake of argument that the states have the power to regulate wholesale rates under Section 20, where the states involved were able to reach an agreement, and that, clearly no state could regulate unilaterally. If such an interpretation is regarded as untenable, and if constitutional limitations as well as potential conflicts in regulation, then—so far as wholesale sales in interstate commerce are concerned—even joint regulation by the states must be deemed invalid. Section 20, then, may be read as leaving to the states the

the absence of congressional prohibition, to retail sales in interstate commerce, but no more.

This view is consistent with the *Attleboro* and the cases preceding it. It is consistent with the idea of filling the gap left by *Attleboro* with federal regulation. Moreover, nothing in the language of Section 20 suggests that Congress granted to the states more powers than *Attleboro* left to them, and much legislative history suggests that Congress was confirming to the states the powers which they had constitutionally exercise. Congress could not have intended, in 1920 when Section 20 was first enacted, to extend state regulation beyond its recognized limits, whatever these limits might ultimately prove to be. Hence Congress' provision for state regulation must have referred only to regulation within the sphere of state authority—which turned out to be limited to retail interstate sales. For *Attleboro* and other cases defining these boundaries had not yet been decided. The 1935 reenactment without change confirmed the dimensions of this sphere.

On the other hand, in enacting the public utility provisions of the Act—Part II—Congress was clearly extending federal regulation. It was extending federal regulation into all the interstices which the states could not reach. Part II, moreover, is the later legislation. All this strongly suggests that in any irreconcilable conflict between Part I and Part II it is the former and not the latter, which must give way. Under a reading, the overlapping of jurisdictions is

energy at wholesale in interstate commerce, though the energy involved is generated at a licensed under Part I, are to be regulated exclusively by the Federal Power Commission. We re- however, that since there is no overlapping of ons in the circumstances of this case, the prob- consistency need not be resolved now.

Power Commission's Order Is Substantively Valid.

l more may be said in answer to petitioner's n that the Power Commission cannot require ement" of petitioner's contract with the cause the contract was terminated in accord- its provisions (Pet. Br. pp. 68-71). A short that the Commission's order does not require ement" of the contract. The order provides, the last rates under which sales were made to , which happen to be the rates under the con- filed as a rate schedule; second, that petitioner om charging—without the Commission's ap- any rates other than those filed with the Com- and, third, that, so long as sales continue, they t the rates so published until petitioner comes ver Commission in a proper proceeding for an which petitioner is free to do. As these never previously been published, the order logically prior step of requiring their publica- ese requirements as to filing and changing of form with the clear provisions of Sections 205 s well as with provisions of Section 20, which

CONCLUSION

For the foregoing reasons it is respectfully suggested
that the order of the Federal Power Commission
be affirmed.

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FEBRUARY, 1952

rtinent provisions of the Compiled Laws of 1929 Edition, provide as follows:

100. COMMISSION CREATED. The public service commission is hereby created whose duty it shall be to supervise and regulate the operation and maintenance of public utilities, as hereinafter defined and defined, in conformity with the provisions of this act.

106. "PUBLIC UTILITY" DEFINED.—EXCEPTION.—EMBRACES ALL CORPORATIONS FURNISHING PUBLIC SERVICE.—FURTHER APPLICATION OF TERM "PUBLIC UTILITY." * * * "Public Utility" shall embrace every corporation, company, individual, association of individuals, their lessees, trustees or receivers appointed by any court whatever, that now or hereafter may own, operate or control any ditch, flume, tunnel or tunnel and drainage system, charging rates, fares or tolls, directly or indirectly, any plant or equipment, or any part of a plant or equipment within the state for the production, delivery or furnishing for or to individuals, persons, firms, associations, or corporations for domestic or municipal, heat, light, power in any form or by any agency, water for business, manufacturing, agricultural or household use, or sewer service whether within the limits of municipalities, towns, or villages or elsewhere; and the public service commission is hereby invested with full

and to the exclusion of the jurisdiction, regulation and control of such utilities by any municipality, town or village, unless otherwise provided.

*

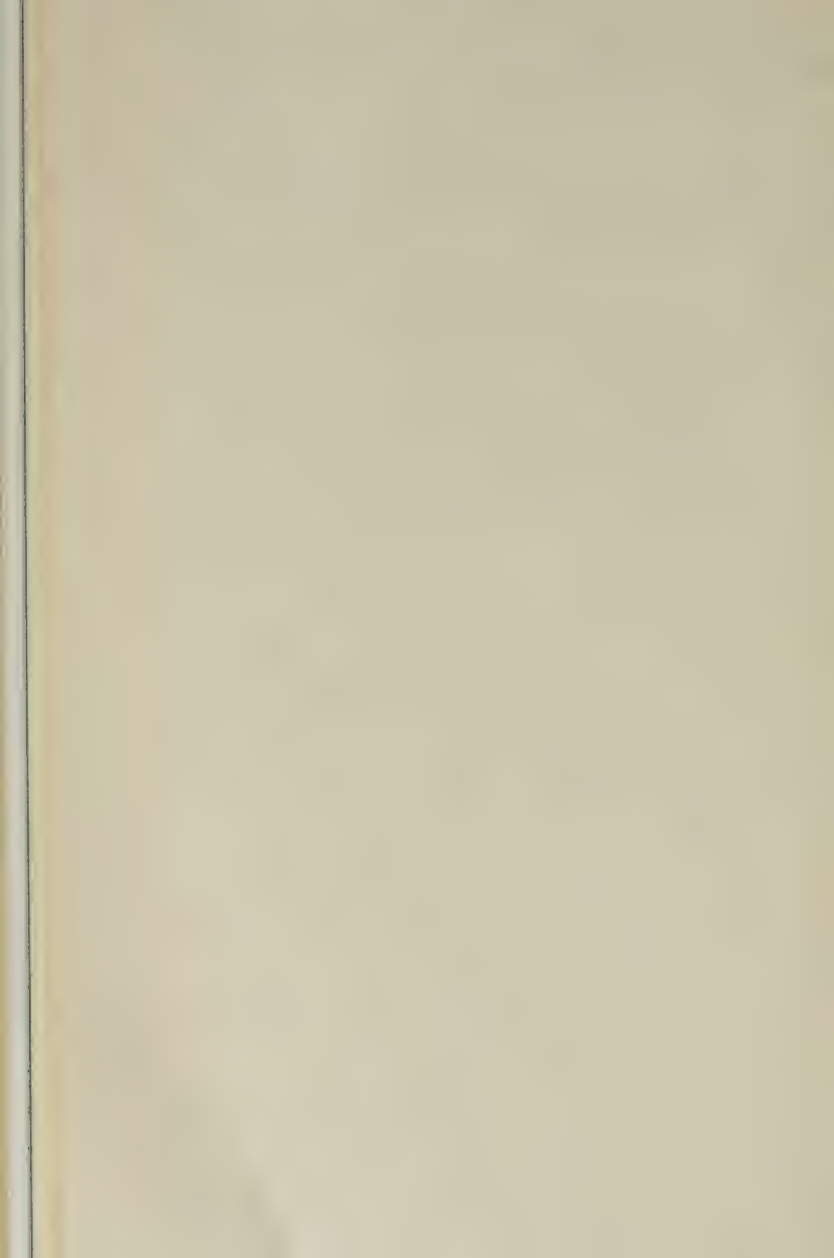
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§ 6147. PUBLIC UTILITY CORPORATION MAY PURCHASE WATER OR ELECTRICITY. Every person, company, corporation, or association, which is engaged in business in this state as a public utility shall have, and it is hereby given, the right to purchase water or electric current for its use from any public utility from any other person or corporation having for sale a surplus of such water or electric current.

§ 6148. MUST APPLY TO PUBLIC SERVICE COMMISSION. Any public utility desiring to purchase such water or electric current for resale or for purposes other than its own use shall file an application with the public service commission setting forth the terms and conditions of the proposed purchase of such electric current from the person or corporation from whom such purchase is proposed to be made, the duration of the contract to purchase, and such other information relative thereto and in the possession of the public service commission as the public service commission may require. If the public service commission shall find it desirable in the public interest, that such purchase be made, it shall approve such application and upon such approval such public utility

FAITH OF STATE PLEDGED. The person or corporation selling such water or electric current to a public utility under such contract approved by the public service commission shall not thereby become, or be deemed to be, a public utility within the meaning of any statute of this state, nor shall it, by virtue of such contract, be deemed to be in or subject to the jurisdiction of the public service commission of Nevada in any respect whatever, nor shall it thereby be deemed to be in any way a public service corporation, or engaged in a public service. The terms and provisions of this act shall be taken and considered to be a part of any such contract, and the faith of the State of Nevada is hereby pledged against any alteration, amendment or repeal of this act during the existence of any such contract, or any extension thereof, approved by the public service commission of Nevada.



IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

NIA ELECTRIC POWER COMPANY, a corporation,
Petitioner,

vs.

POWER COMMISSION,

Respondent.

PETITIONER'S REPLY BRIEF.

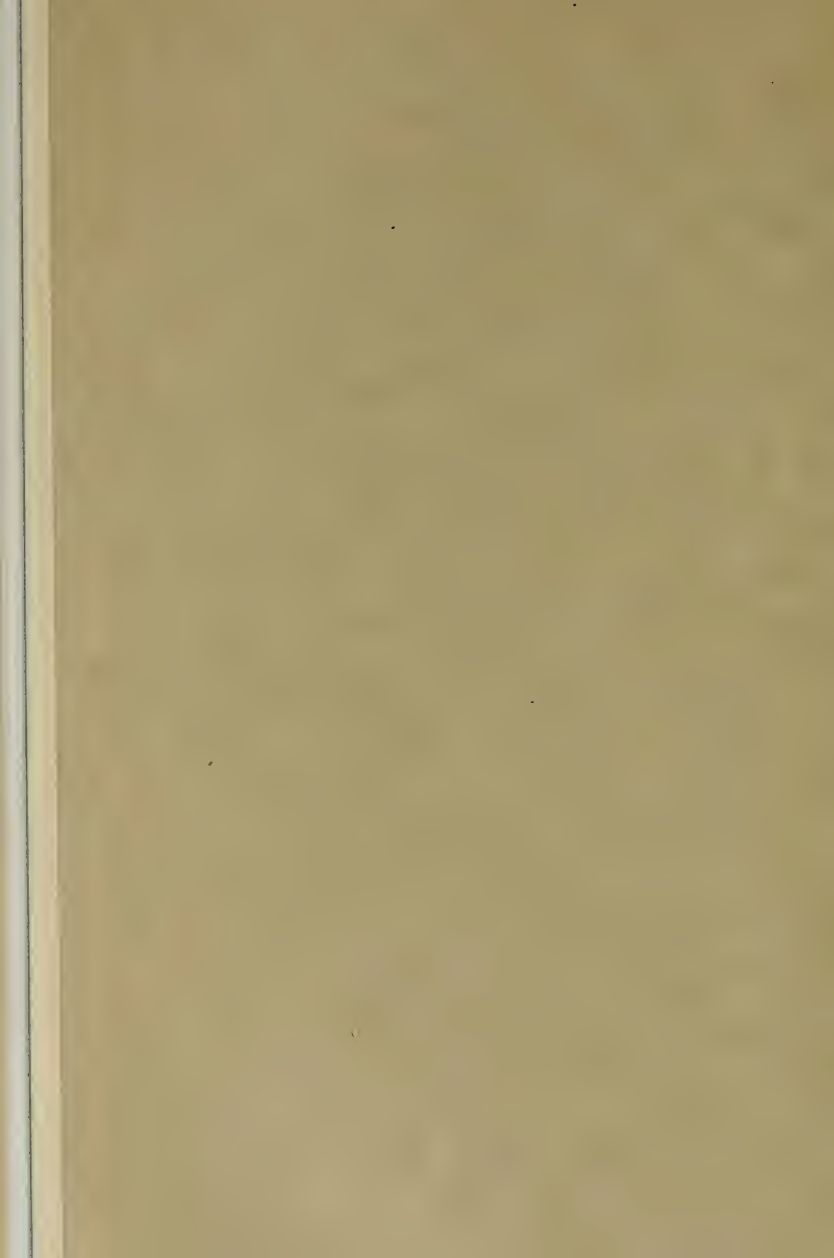
tion for Review of an Order of Federal Power
Commission.

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FILED

HAMMACK,
H M. LEMON,

FEB 28 1952



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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PHOENIX ELECTRIC POWER COMPANY, a corporation,
Petitioner,

vs.

POWER COMMISSION,

Respondent.

PETITIONER'S REPLY BRIEF.

Respondent (FPC) and Intervenor (Navy and County), in their briefs, follow substantially the line of argument, we will reply to all of them.

Some of our arguments they fail to answer, and cite no decision which sustains their contention. They complain that we rely upon the literal language of the statute and, to avoid its effect, they call it a matter of draftsmanship."

Tendency of FPC to ignore Part I of the Act is apparent in their brief, for, though Petitioner's brief follows the natural order in discussing Part I of the

**This Case Can Be Decided and Should Be
Under Part I of the Act, Which Clearly
FPC Jurisdiction.**

Both by contractual provisions of Petitioner's (Pet. Op. Br., App. p. 6) and by the statutory provisions of Sections 19 and 20 of the Act, the regulation of Petitioner's rates involved herein is delegated to the State Commission or Commissions. If no interstate commerce is involved, the jurisdiction of California's State Commission is complete under Section 19. If interstate commerce is involved, the jurisdiction lies in the two State Commissions under Section 20. In either event, the FPC does not have jurisdiction, and will not have it. It may be found at some future time that the State Commissions are unable to agree. There is no occasion for recourse to Part II of the Act.

Safe Harbor W. P. Corp. v. FPC, 120 F. 2d 1011 (C. A. 3) decided in 1941 (First Safe Harbor Case).

Following that decision, the distinction between the rights and obligations of licensees under Part I of the Act and other interstate utilities under Part II of the Act was clearly recognized in two other circuits.

Alabama Power Co. v. FPC, 128 F. 2d 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030, 1031, 1032, 1033, 1034, 1035, 1036, 1037, 1038, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, 1053, 1054, 1055, 1056, 1057, 1058, 1059, 1060, 1061, 1062, 1063, 1064, 1065, 1066, 1067, 1068, 1069, 1070, 1071, 1072, 1073, 1074, 1075, 1076, 1077, 1078, 1079, 1080, 1081, 1082, 1083, 1084, 1085, 1086, 1087, 1088, 1089, 1090, 1091, 1092, 1093, 1094, 1095, 1096, 1097, 1098, 1099, 1100, 1101, 1102, 1103, 1104, 1105, 1106, 1107, 1108, 1109, 1110, 1111, 1112, 1113, 1114, 1115, 1116, 1117, 1118, 1119, 1120, 1121, 1122, 1123, 1124, 1125, 1126, 1127, 1128, 1129, 1130, 1131, 1132, 1133, 1134, 1135, 1136, 1137, 1138, 1139, 1140, 1141, 1142, 1143, 1144, 1145, 1146, 1147, 1148, 1149, 1150, 1151, 1152, 1153, 1154, 1155, 1156, 1157, 1158, 1159, 1160, 1161, 1162, 1163, 1164, 1165, 1166, 1167, 1168, 1169, 1170, 1171, 1172, 1173, 1174, 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intentions of our opponents to escape the plain
as of the Act and the effect of those decisions
follows:

is contended (FPC Br. p. 12) that *Safe Harbor
Corp. v. FPC*, 179 F. 2d 179 (C. A. 3) decided
(Second Safe Harbor) and *Pennsylvania W. & P.
FPC*, F. 2d, (D. C. Cir.) decided
1951 (certiorari granted), have in some way
d the application of Sections 19 and 20 of the
also weakened the decision in *First Safe Harbor*.
First Safe Harbor, it was held that FPC did not
jurisdiction over rates for energy sold at wholesale
state commerce by a licensee, there being no show-
States' disagreement. The energy was generated
sylvania and transmitted and sold for resale in
d. The crucial fact not stressed by our oppo-
that, after *First Safe Harbor* was decided in
very important change in conditions occurred.
s a letter, dated August 30, 1944, sent by Public
Commission of Maryland to FPC requesting it
jurisdiction in that same matter of rates charged
Harbor W. P. Corp. for energy generated in
vania and sold for resale in Maryland. That
as set forth in full and relied upon as showing
States were unable to agree in *Second Safe*
decided in 1949, and that decision was followed
Pennsylvania W. & P. Co., decided in 1951. There-
according to the express language of Section 20
Act, FPC had jurisdiction.

finding or evidence that the California and Nevada Commissions are unable to agree. In the Navy's brief it is twice incorrectly stated (pp. 18, 19) that the California and Nevada Commissions have been unable to agree. In both of our opponents' briefs, it is intimated that the duty rests on Petitioner to show that the State Commissions have agreed or are able to agree. That is an endeavor to turn Section 20 around. That Section does not require any such showing. It does require, as set out in our Opening Brief (pp. 46-48), a showing that they are unable to agree, in order to support Federal jurisdiction. There is no such finding or evidence.

The matter is so simple that much ingenuity was necessary to make it appear complicated. The Commission of the delivering state (California) regulates the rates charged for sales of energy for use in the receiving state (Nevada). If there is no protest from the latter, there is no failure to agree. Nevada Commission has no reason to protest, for the California Commission fixes exactly the same rates for sales to Mineral Wells purchasers at Petitioner's Mill Creek Plant in California as it does for other consumers of like quantities of energy sold to other customers in California. It is a well-known national note that California Commission is one of the most rigorous Commissions in the country in the matter of keeping utility rates at a minimum.

2. It is contended (FPC Br. pp. 37-40, 44-45) that Nevada does not have a Commission answering

and irrelevant evidence to dispute the plain language of Section 16 of the Mineral County Power System Act (Pet. Op. Br., App. p. 10). The first piece of evidence was Exhibit 6, being an opinion of the Attorney General of Nevada to the effect that the Nevada Commission did not have jurisdiction over the rates of Mineral County Power District No. 1, which was an entirely different kind of entity organized under a different

The next piece of evidence was a letter from the Secretary of the Nevada Commission, stating that the Nevada Commission did not have jurisdiction over Mineral County Power System, because the latter was a quasimunicipal entity, which was not the fact. This was lay opinion contrary to the clear provisions of the Nevada law, and was rejected by the Hearing Examiner [R. 244-247]. But, at the hearing [R. 110], FPC reversed the Examiner and incorporated this letter in the record.

At the hearing herein, Nevada Commission requested the opinion of the Attorney General of Nevada as to its jurisdiction over rates of Mineral County Power System, and the Attorney General rendered the opinion [R. 129] that the Commission did have jurisdiction just as provided in Section 16 of the Mineral County Act, and further explained the basis of his earlier opinion, Exhibit 6.

FPC refused to receive this when tendered with our

To this plain error, FPC interposes two respon

First, it says that technical rules of evidence be applied and no informality in taking testimony invalidate an order. Bearing in mind that this crucial point on which the whole case turned Part I of the Act went, it is rather amazing that to ignore the Nevada Statute, to reject the opinion of the Attorney General, and to receive instead a lay opinion relating to a different matter and lay opinion taken up by hearsay testimony of a stranger is merely an infraction of the rules of evidence or an inform

Secondly, while not claiming that the presentation of the Attorney General's opinion of April 24, 1950, was too late, FPC merely says that it was late. As a matter of fact, a copy of that opinion was presented to FPC as an appendix to our Reply Brief filed with FPC on September 1, 1950, only three months after the hearing and two months after the opinion was written and one month after we had knowledge of it. On September 5, 1950, the Examiner filed his initial decision [R. 13] sustaining the Petitioner on every point and recommending the dismissal of the case. The Attorney General's opinion had been given consideration and Petitioner had won the case. There was no occasion for Petitioner to do anything further. FPC then held the case under advisement for five months from September 5, 1950, to April 13, 1951.

, the Application for Rehearing filed May 4,
[R. 113] was accompanied by Motion to Reopen
and receive the neglected Attorney General's
[R. 126]. FPC could have admitted the Attor-
ney's Opinion as easily as it admitted other and
relevant evidence which had been excluded by the
court.

FPC, confronted with the clear fact and law that
the Commission does have jurisdiction to regulate the
Nevada Mineral County, makes what we have properly
called the "bizarre" contention that the Nevada Com-
mission is not, as provided in Section 20, "a commission
with authority to enforce the requirements of this sec-
tion *in* such state," unless it has power to enforce
the requirements of said section *without* such state. It
is clear that Congress could have had in mind only the
existence of a state regulatory body empowered to regulate
within its own state. There was no concept what-
soever of a State Commission which would have authority
to regulate rates outside its own state.

It cites the statutes of Maryland and Pennsylvania
to give the respective Commissions authority to make
investigations, hold joint hearings, and issue joint
orders with any other like Commission.
The statutes were enacted in 1927 and 1937, re-
spectively, long after 1920 when the language of Section

any provision in State law authorizing the Commission to participate in a concurrent hearing with the federal commission, the Order to Show Cause [R. 7-8] set such a hearing and the same was done. FPC Rules (Sec. 1.37) made pursuant to Sections of the Act provide, not only for concurrent hearings for joint hearings with State Commissions, irrespective of any state statute expressly authorizing the same, but also annual reports of FPC for many years back shall include such hearings and other forms of cooperation with frequent occurrence under the Act, without any corresponding state legislation. Obviously State Commissions have as much power to cooperate with each other as they do with FPC.

FPC makes the obviously unsound contention (and attributes it to us) that, if Mineral County is overcharged for energy, all the Nevada Commission need do would be to refuse to allow Mineral County to pay rates high enough to pay the excessive charge. If their counsel will just read Section 20, they will find that the Nevada Commission need do would be to accept its inability to agree upon the higher rate and then automatically invoke jurisdiction of FPC.

Equally extreme is the misconstruction placed (Br. p. 17) upon Sections 6147, 6148 and 6149, Nevada Compiled Laws, as in some way incapacitating the Commission in acting under Section 20. These

sons, not to engage in public service have surplus power available for sale to a public utility. As fear that, by such sales, the private owners become public utilities. This statute was designed to encourage such sales by assuring the seller that he will not be caught in the regulatory machinery. It is only to sellers who are not public utilities and protect them they shall not, by such sales, become public utilities. This interpretation of the Act is demonstrated by the final sentence—a very unusual provision—which binds the faith of the State of Nevada against any amendment, repeal or amendment of the act during the term of any such contract. To apply that act to a seller who is already a public utility would reduce the statute to an absurdity.

It is quite evident that FPC does not like Sections 19 and 20. It prefers Part II of the Act and makes only a cursory recognition toward Section 20, always linking it together with Sections 205 and 206.

If Sections 19 and 20 mean anything at all, they mean that the State Commission or Commissions have exclusive jurisdiction so long as such Commissions exist and do not disagree. The device of ignoring this State jurisdiction by speaking broadly of FPC jurisdiction under Sections 20, 205 and 206, jointly, is misleading. Obviously both State Commissions and FPC cannot at the

Petitioner's Rates Involved Herein Are Not to Regulations by FPC Under Part II, 205 and 206.

Whether or not the energy delivered by Petitioner to the Navy and Mineral County is generically or constitutionally in interstate commerce is not an issue. Some interstate energy is expressly excluded by statute from FPC jurisdiction and left for regulation by the States. That is constitutionally permissible and was cited in our Opening Brief (pp. 34, 39, 40) and is not questioned by Respondent or Intervenor.

Admittedly, regulation of one very large class of interstate sales is delegated to State authority, *via* the depot, directly to the ultimate consumer, and not for resale. Hence, the effort of FPC and Navy in this case is to force that Navy resells some of the energy to employees on the Ammunition Depot Reservation. Such a sale is colorable and is really a part of the operation of the Depot. The occupants live under military discipline and are subject to summary ejection by the Commanding Officer [Ex. 23].

This exemption of sales in interstate commerce to individual customers for consumption is worth remembering. It shows that Congress did not think it necessary or desirable to provide for federal regulation in such cases. It provided for federal regulation only where electricity (or gas) was sold for resale to the general public. It was trying to protect the general consumer, not typically a city or community. The record here

ates there are arbitrarily fixed without reference of power purchased from Petitioner. All that is to do is to fix house rent, electricity, water, garbage disposal and other services at a price aggregate which will attract employees for work in a hazardous place. It is immaterial how the expense is distributed among the accommodation services furnished. The whole is merely a matter of internal accounting of the Navy. Of course, this is not a case in which the Navy should not have a fair rate; it is not a case in which this is not an example of resale regulation which could carry out any policy of Congress since regulation of the rate at Mill Creek would have no material relation to the rate charged the ultimate consumer.

There is no class of business which could constitutionally be treated as interstate commerce, but which is excluded from the jurisdiction of FPC is transmission of energy from one State to another by the government, a State, a local corporation, or other political subdivision, agency or instrumentality. Section 201(f) states that "No provision of this Part (II) shall apply to" any of the above. FPC's argument that this applies to those activities but not to their activities is too captious to recommend. Hence, the definition of interstate commerce for electric energy in Section 201(c) does not apply to the activities of governmental agencies or activities. Navy and San Diego County simply buy energy at the Petitioner's Mill Creek plant in California. What is done with it by other public agencies is outside the statute and cannot be

vantageous rate than the rates fixed by the Commission. What assurance they have of that we do not know, but it certainly cannot always be true. It is hardly possible that their interest is purely academic, even if it were supposed that FPC would fix higher rates. Previously, the interest of the intervenors would have been to did not produce a complete reversal of position.

As we have said, FPC jurisdiction attaches under Section II only to rates for energy sold at wholesale in interstate commerce and wholesale is defined in Section 306 as "a sale of electric energy to any person for resale." The definitions in Section 3, which apply throughout the Act, define a "person" so as not to include Navy or County. Our opponents admit that this is the plain provision of the Act, and their only escape is to call it a "quirk of draftsmanship." Some provisions they want to be interpreted very literally; others adverse to them they want ignored or cast aside as clerical misprisions.

The contention of FPC is directly contrary to the position they took respecting the word "person" in *United States ex rel. Chapman v. Fed. Power Com.*, 100 F.2d 796 (C. A. 4). Their brief in that case is on pages 59-61 of our Opening Brief. This is denied.

FPC argues (p. 23) that our contention would give effect to Section 306 of the Act allowing

word "person" was deemed not to include governmental agencies. Section 306 provides:

any person, state, municipality, or State Commission complaining of anything done or omitted to be done by any licensee or public utility" etc. etc.

demonstrates the understanding of Congress that the word "person" alone would not have included municipality, or State Commission," and it was necessary to mention them expressly.

any decision cited holding that Section 3(3)(4)(7) of the Act of 1938, 201(d) do not mean what they say is the basis of FPC in *Otter Tail Power Company*. That the present argument goes on the assumption that, if municipalities for resale are not brought under FPC jurisdiction, they must go unregulated. That is not true. It means merely that they are left to the State Commission.

In the present case, they have been so regulated. They have had two moderate and reasonable increases to meet increased costs of service (measured in present day dollars) have been granted in the past three or four years. The last order was sought by Navy and Mineral Resources in the Supreme Court of California and denied. (31, Feb. 18, 1952.) Under California law, such a decision is deemed a decision on the merits and tantamount to the Commission's decision.

statements made by FPC about "filling the gap" left by the *Otter Tail* are misleading. There was no gap created by the *Otter Tail* decision. Licensees were concerned. As to other interstate utilities, the gap was filled by conferring part of the

So, on two counts, sales to Navy and Miners are exempt under Part II, first, because they are interstate commerce as defined in the Act, and, because they are not sales to a "person" as defined in the Act.

SOME JURISDICTION UNDER PART II.

It is hardly fair to say, as FPC does (p. 10), that Petitioner's position is taken as a "tactical maneuver" because it admits some FPC jurisdiction under Part II. The inference seems to be indulged, contrary to established principles, that, if Petitioner is subject to some provision of Part II, it is subject to all and, hence, all are all subject to FPC regulation. This is very far from so and the argument now presented by FPC is designed to confuse.

The mere fact that a Company is a public utility engaged in interstate transmission in electric energy does not subject all of its rates to FPC regulation. Congress gave FPC would succeed to all of the functions of the Public Utility Commissions so far as interstate utilities are concerned. Each particular rate has to be examined to see if it is provided in Sections 205 and 206, the transmission sale is subject to FPC jurisdiction and, for that matter, we look to Section 201.

That is exactly what FPC held in *In the Matter of Wisconsin-Michigan Power Co.*, Docket E-6268, 1951, quoted at page 36 of our Opening Brief.

Accordingly, it is not only logical but necessary that a utility engaged in interstate transmission to acquire

ses cited (Resp. Br. p. 12) being *Second Safe and Pennsylvania W. & P. Co.* do not indicate any. Respondent's discussion, itself, discloses that of those cases was decided on the principle that cases were unable to agree, thus bringing in FPC jurisdiction under Section 20. Therefore, the rest of the discussion as to jurisdiction under Part II is unnecessary.

"DISTINGUISHABLE" 25%.

Respondent claims that, of the energy delivered by Petitioner to the Government, approximately 25% is "resold" to employees at government quarters in the Naval Reservation and is therefore, subject to FPC jurisdiction. It must be noted that the remaining 75%, at least, is not subject to FPC jurisdiction. Next, FPC says that the two cases cited and therefore FPC has jurisdiction over the matter. In our Opening Brief, we asked in effect why FPC let the "tail wag the dog."

Respondent's answer (p. 27) is based on five cited cases.

The cases *Central P. & L. Co.*, *Connecticut L. & P. Co.*, *Longford E. L. Co.* are not in point, for they did not raise issues for mingled energy or rates at all. The question there presented was whether or not those cases came under the accounting provisions of Part II of the Act. It was held that they did, because they were engaged in interstate transmission of energy, notwithstanding that the amount of energy transmitted was small. Obviously, if these Companies were required to use the FPC system of accounts, they would have to

to keep one set for intrastate operations and another for interstate operations. That is quite a different thing from the mere delivery of so many kilowatt hours of energy at a schedule rate which can be very easily increased or apportioned.

Kentucky Natural Gas is not in point, for that case states that the entire operations of that Company were in interstate commerce.

That leaves only *Pennsylvania W. & P. Co.* (not reported). Certiorari has been granted in that case on February 4, 1952, so that it cannot be deemed a final decision. If it were, however, it does not present facts applicable to the instant case. There the local and interstate supplies of energy were fed into a common system from which local and interstate customers were supplied. In such a situation, power flows here or there as a demand is placed on the lines, much the same as water flows out of a reservoir wherever resistance is least. The respective flows of intrastate energy (hydro) and interstate energy (steam) fluctuated continually from hour to hour, day to day, and even year to year. Each state and interstate, supported the other. This was simply a big "pool" of electric force fed constantly from both sources in constantly varying quantities.

That is entirely different from the present case, where each month a definitely measured number of

Navy) show these quantities accurately separated
th. We have used 25% and 75% merely for
argument. The respective amounts can be
to decimals [see Finding 6, R. 105]. No repe-
mission action would be required. The federal
commission would simply fix the respective
rest being mere mechanical and clerical com-

is no "inextricable" mixture in such operations.
Power Co. v. Fed. Power Com., 189 F. 2d 665
(Cir.), we have an instance where FPC imposed
condition in a license for a transmission line that
connect said line with the government's line
transmit government power, along with licensee's
While that condition was stricken out by the
the question is suggested: If the arrangement had
proved, would the next step have been for the
ent to claim that, since the licensee's power and
government's power were inextricably intermixed on
transmission line, therefore, it all belonged to the
ent? Certainly not, for the mixture and separa-
power in that way is a common every day job for
engineers. The case cited by Respondent (*City
of Los Angeles v. The Nevada-California Electric Corp.*,
C. 104, 32 P. U. R. N. S. 193) was an ex-
that operation. There is no logical, reasonable
plausible support for that part of the Order herein

FPC argues (pp. 3-4) that Petitioner acquiesced in FPC regulation under Part II by filing some Mineral County contracts as schedules. If the FPC has jurisdiction as to Mineral County service, Petitioner's failure to file the Navy contract equally disposes of its claim of jurisdiction. As a matter of law, neither fact nor law, anything, for jurisdiction cannot be conferred by acquiescence, estoppel, waiver or agreement. Jurisdiction is solely from the statute.

FPC cites *City of Los Angeles v. The Nevada Electric Corp* (*supra*). That case does not support any claim of acquiescence, for it involved no energy at all and, hence, in no event could come under Sections 19 or 20, which apply only to sales. The facts in that case were that this Petitioner, under an agreement transmitted or carried power for the City of Los Angeles over this Petitioner's line from Hoover or Boulder Dam in Nevada to the City of Los Angeles for a charge. The power was part of that allocated to the City by the Government at the Dam, was purchased by the City from the Government and merely transmitted by the Company to the City. This transmission was interstate, and is subject to FPC jurisdiction under Part II of the Act, there being no provision in Part I applicable thereto. This case is of no significance here.

n to issue a license under Part I of the Act
ctric line which was not a "primary line," that
transmission line leading from a licensed project
ginning with the organization of FPC in 1920
some 20 years until March 20, 1941, FPC
issued such licenses for minor lines of all kinds,
of them, and many of such licenses are still
g. FPC jurisdiction to do so was formally
by FPC and by the Secretaries of the Interior,
re, and War, who had previously issued per-
rights of way under the Right of Way Acts
ur Opening Brief. Indeed, the three Secretaries
denied their own jurisdiction and refused to
further permits, the applicants being referred
or licenses under Part I of the Act.

rch 20, 1941, FPC suddenly issued Release
ying its jurisdiction to issue such licenses and
since refused to do so, referring applicants to
aries, who have resumed their activities, so long
d, under the old Right of Way Acts. Pacific
Co. sought such a license from FPC and, on
petitioned for review in the Court of Appeals
istrict of Columbia.

court affirmed FPC's decision and held, contrary
stration construction, interdepartmental agree-
20 years of general understanding, that FPC
ave jurisdiction to issue such licenses for "non

Conclusion.

There is no regulatory gap to be filled in . . .
Nothing has escaped or will escape proper and
regulation exactly as contemplated by Congress.
This case seems to have been begun by FPC through
misunderstanding of Nevada law and the Intervenor
apparently merely assuming that federal regulations
afford them lower rates.

The Order should be reversed.

Respectfully submitted,

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No. 12,987

IN THE

United States Court of Appeals
For the Ninth Circuit

CALIFORNIA ELECTRIC POWER COMPANY,
Corporation,

Petitioner,

vs.

FEDERAL POWER COMMISSION,

Respondent.

FILED

MAR 31 1952

PAUL P. O'BRIEN
CLERK

CHIEF OF CALIFORNIA PUBLIC UTILITIES COMMISSION
AS AMICUS CURIAE.

Application for Review of an Order of Federal Power Commission.

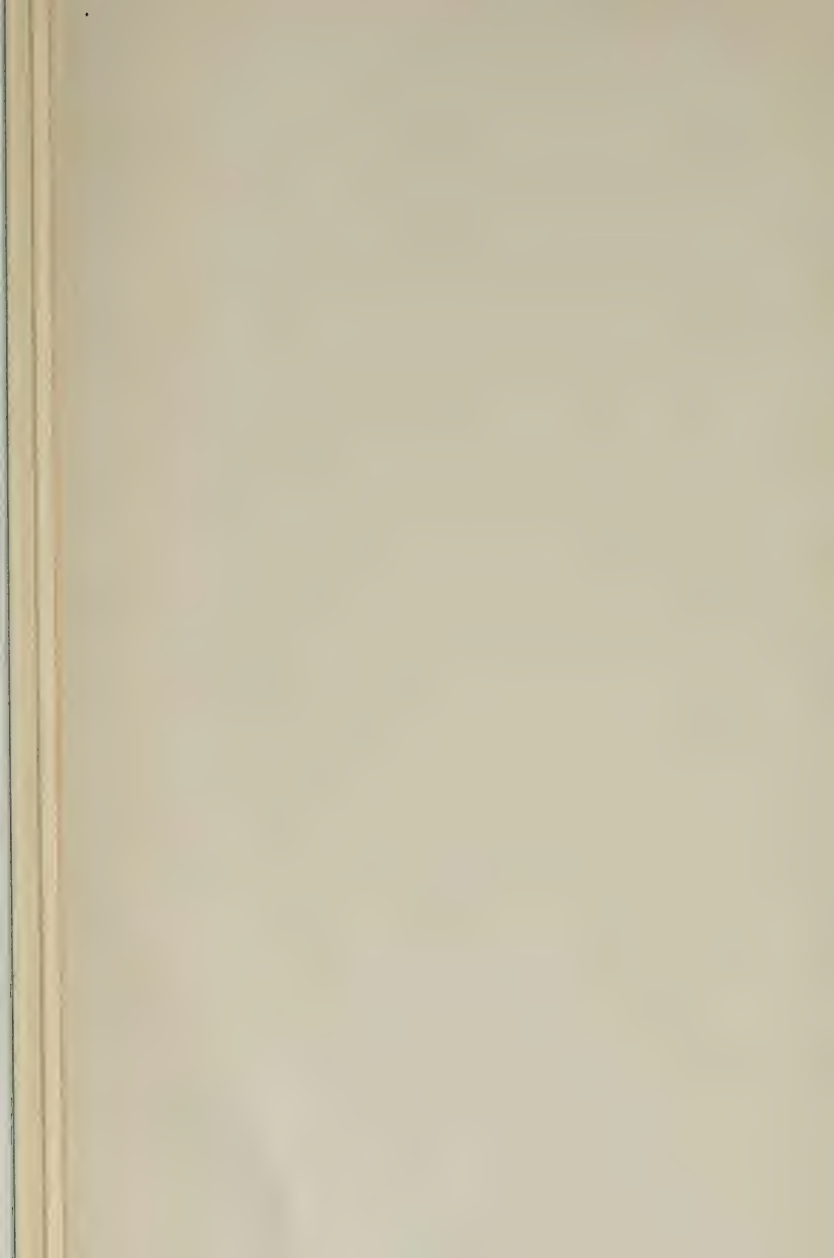
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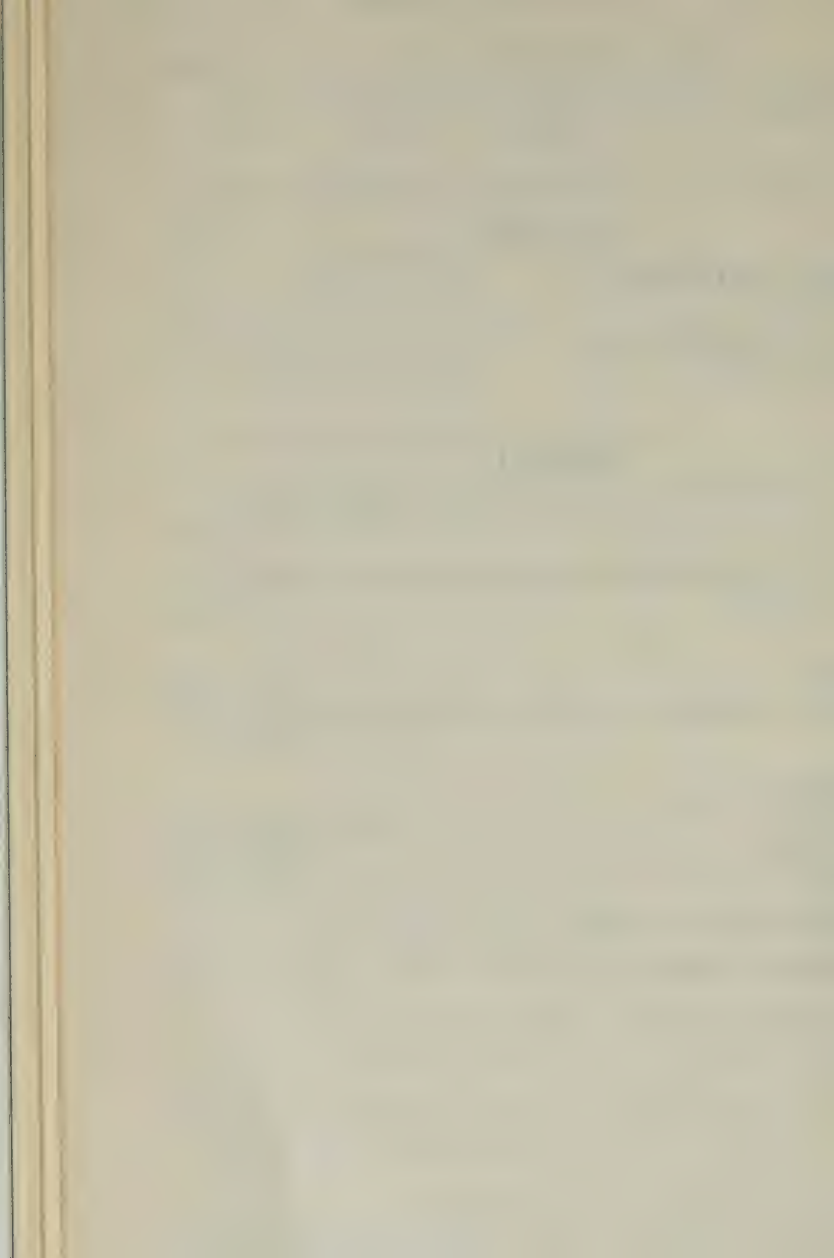
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IN THE

**United States Court of Appeals
For the Ninth Circuit**

ANIA ELECTRIC POWER COMPANY, poration, S.	}	<i>Petitioner,</i>
L POWER COMMISSION,		<i>Respondent.</i>

**F OF CALIFORNIA PUBLIC UTILITIES COMMISSION
AS AMICUS CURIAE.**

for Review of an Order of Federal Power Commission.

INTRODUCTION.

California Public Utilities Commission respectfully
its presentation herein, being mindful that an
curiae brief may properly presume upon the
attention only if it serves to illuminate the course
ment or advances additional material for consider-
The California Commission agrees with California
Power Company that the order of the Federal

ever, the California Commission's approach is in all respects the same. The plan, therefore, will be to present the pertinent arguments and to develop those which require further analysis, to the end that the fallacies which underlie the Federal Power Commission's claim of jurisdiction may be readily detected.

The California Commission has more than passing interest in the question. On July 3, 1951, it issued Order No. 45913, reported in 50 Cal. P.U.C. 749, attached as Appendix A hereto. The question of state versus federal jurisdiction was thoroughly explored because it was necessary to determine whether certain rate increases authorized generally by the California Commission to the Southern California Electric Power Company were to be applied to the Navy and Mineral County. The California Commission had the benefit of the same testimony and briefs which were before the Federal Power Commission in the proceeding which led to the decision here attacked. The California Commission concluded that it had jurisdiction. Attention is respectfully invited to the corresponding conclusion of the federal Examiner in his report of September 5, 1950, that the Federal Power Commission did not have jurisdiction. His proposed decision is set out in the Record herein beginning at page 13, merits a careful study as it is a well-prepared, well-reasoned, logical opinion. Seven months after it was filed, the Federal Power Commission, Commissioner Nelson L. Rockefeller dissenting, issued the precisely contrary opinion.

g him, without explanation, in his rulings upon
possibility of evidence.

California Commission decision was made the sub-
petitions for writs of review filed before the Cali-
Supreme Court by the United States (Navy De-
t) and by Mineral County. Writs of review were
n January 21, 1952, and petitions for rehearing of
ial were denied on February 18, 1952. Under Cali-
procedure, the California Supreme Court's action
to a determination upon the merits.

*Southern California Edison Co. v. Railroad Com-
mission*, 6 Cal. 2d 737, 747 (1936);

Yuba Valley Electric Co. v. Railroad Commission,
251 U.S. 366, 371-373 (1920);

Santa Monica v. Railroad Commission, 179 Cal. 467
(1918).

Following outline of dates presents graphically the
of events alluded to:

**Proceedings Commencing
in Calif. P.U.C.**

2, 1949, Calif. Elec.
Co. filed application to
Calif. P.U.C. determine
r certain rate increases
to sales to Navy and
l County.

hearing Oct. 7, 1949.

**Proceedings Commencing
in F.P.C.**

February 15, 1950, F.P.C. is-
sued order to show cause
against Calif Elec Power Co.

**Proceedings Commencing
in Calif. P.U.C.
(Continued) :**

**Proceedings Commencing
in F.P.C.
(Continued)**

March 20, 1950

Concurrent hearing before Calif.
and Fed. Commissions on jurisdic-
tional question. Briefs subse-
quently filed by the appearances.

September 5, 1950,
Decision filed by
for F.P.C., denying
jurisdiction.

April 13, 1951, F.P.C.
212, reversing Exa
asserting jurisdiction.

June 5, 1951, F.P.C.
rehearing.

June 21, 1951, Calif.
Power Co. filed Petition for
Review in this Court.
Appeals for the Ninth Circuit.

July 3, 1951, Calif. P.U.C.
Decision 45913, finding juris-
diction in the California
Commission.

January 21, 1952, California
Supreme Court sustained
Decision 45913 by denying
writs of review, S. F. No.
18463 and S. F. No. 18464.

February 18, 1952, California
Supreme Court denied re-
hearing, S. F. No. 18463 and
S. F. No. 18464.

subject to Federal Commission regulation in some cases. Under the Federal Power Act there cannot be simultaneous jurisdiction by state and federal authority over such sales. It is respectfully submitted that the decision of the California Commission in its Decision No. 10, as approved by the California Supreme Court, is correct and if so, it follows that the Federal Power Commission has no jurisdiction over these sales.

In proceeding with the argument one or two preliminary observations will be appropriate.

When one reads the opinion of the Federal Power Commission and its brief before this Court, one is impressed by the absence in general of differentiation between the facts pertaining to the sales to the Navy and those pertaining to the sales to Mineral County. Such approach creates confusion in a complex field. While a number of pertinent arguments apply equally to both types of sales, there are certain arguments which apply specifically to one or the other. For that reason, care will be taken in the analysis here to keep the questions properly separated.

At the hearing upon the order to show cause, the staff of the Federal Power Commission introduced evidence that, while most of the electric energy sold to the Navy and to Mineral County is derived from licensed sources, there are times when all or a portion of it

portion of the electric energy sold, the best-reasoned interpretation of the Federal Power Act makes Section 201 of Part I the applicable section in determining jurisdiction over the sales to the Navy and Mineral County. It will be shown that by the application of that section, jurisdiction is lodged in the Federal Power Commission upon the facts. However, the applicability of Section 201 need not be finally determined because, as will be shown, no Federal Power Commission jurisdiction lies, and therefore the Act be construed to make Part I, Section 201 applicable or Part II, Section 201(b).

Similarly, it will be shown to be unnecessary to determine whether the sales are in intrastate or interstate commerce. The Federal Power Commission would hold that its jurisdiction does not lie if the sales are in intrastate commerce. The argument here will assume that the sales both to the Navy and Mineral County are in interstate commerce. It will be demonstrated that, notwithstanding, no Federal Power Commission jurisdiction

An outline of the pertinent arguments establishing the absence of Federal Power Commission jurisdiction is presented in the belief that it may prove of material assistance. It is divided into three main headings. Point I, *arguendo* wholesale sales in interstate commerce to a licensee. We deny that the sales to the Navy and Mineral County are of that character. However, since the order of the Federal Power Commission lumps the sales to

Point I is presented to show that, even upon *that* the Federal Power Act, properly construed, Part I applicable and excludes Federal Commission provided the states directly concerned have no commissions and have not been shown unable to pay the rates to be charged. This, we maintain, is the interpretation of the Act which respects the intent of Congress.

Point II deals solely with sales to the Navy. It shows, that Part I, Section 20, precludes Federal Power Commission jurisdiction because the conditions to its exercise are not met. Secondly, it shows that Part II does not apply for a number of reasons in addition to those presented in Point I.

Point III deals solely with sales to Mineral County. Showing that wholesale sales are here involved, it first shows that Part I, Section 20, precludes Federal Power Commission jurisdiction because the conditions to its exercise are not met. Secondly, it shows that Part II does not apply for two reasons in addition to that presented in Point I.

OUTLINE OF ARGUMENT.

Point I. The Federal Power Act must be construed in its entirety, giving equal weight to Parts I and II, and must be interpreted so as to avoid conflict between its various sections. By applying such recognized principles of construction, the Act is found to exclude Federal Power Commission jurisdiction over interstate wholesale sales by a licensee where the states directly concerned have regulatory commissions and there is no showing that such states are unable to agree on the rates to be charged for such sales.

A. The Federal Power Act must be construed in accordance with recognized rules of statutory construction.

B. The jurisdictional sections of the Act applying to interstate sales, Part I, Section 20, and Part II, Section 201(b), must be construed together to give effect to the intent of Congress. Such construction makes Section 20 apply to interstate wholesale sales by a licensee where the states directly concerned have regulatory agencies and there is no showing that such states are not shown unable to agree on the rates to be charged.

1. Part II was enacted to give the Federal Power Commission jurisdiction only in the absence of state regulation revealed by the *Attlesboro* decision.

2. By virtue of the Water Power Act

directly concerned had regulatory commissions and such states were not shown unable to agree on the rates to be charged for such sales.

The foregoing interpretation of the Federal Power Act applies even though part of the power sold by the licensee is derived from non-licensed sources.

Effect of existing court decisions.

Sales to the Navy.

Federal Power Act does not give the Federal Commission jurisdiction over the sales to the Navy. Whether Part I, Section 20, applies, covering both licensed and non-licensed portions of the energy sold, or Part II, Section 201(b), applies, covering both the licensed and non-licensed portions, or Part I applies to the licensed portion and Part II applies to the non-licensed portion of the energy sold.

Assume Part I applies, extending to the non-licensed as well as the licensed portion of the energy. If the sales to the Navy be found to be interstate commerce, it is enough under Section 20 that the State of California has provided a commission with authority to prescribe rates charged by California Electric Power Company because California is the only state "directly concerned."

state commerce, they are exempt from r
under Part II for three separate reasons
tion to that given in Point I hereof. An
such reasons is sufficient in itself to precl
lation under Part II.

1. The sales are not sales at wholesa
quired by Section 201(b) because they
sales "for resale" as specified in
201(d).
 2. The sales are not sales at wholesa
quired by Section 201(b) for the a
reason that they are not sales to a '
as specified in Section 201(d) and a
in Section 3(4).
 3. Section 201(f) provides that Part II
apply to the United States. Such lang
be construed to exempt sales to the N
regulation under Part II.
- C. Assume Part I applies to the licensed p
the energy sold and Part II applies to
licensed portion.
1. As to the licensed portion, the same a
against Federal Power Commission ju
apply which are set forth in II. A. a
 2. As to the non-licensed portion, the sa
ments against Federal Power Comm
risdiction apply which are set forth

. *Sales to Mineral County.* (Mineral County
er System is the name used by Mineral County,
ada, in operating an electrical distribution sys-
)

Federal Power Act does not give the Federal
ommission jurisdiction over the sales to Mineral
whether Part I, Section 20, applies, covering
licensed and non-licensed portions of the energy
Part II, Section 201(b), applies, covering both
sed and non-licensed portions, or Part I applies
censed portion and Part II applies to the non-
portion of the energy sold.

Assume only Part I applies, extending to the non-
censed as well as the licensed portion of the
energy. If the sales to Mineral County be found
o be in interstate commerce, the requirements of
ection 20 for precluding Federal Power Commis-
ion jurisdiction are met, because: (a) the states
directly concerned," viz., California and Nevada,
ave provided commissions with authority to en-
orce the requirements of Section 20 within their
espective states, and (b) such states have not
een shown to be unable to agree on the rates
rescribed by the California Commission.

Assume Part II applies, extending to the licensed
s well as the non-licensed portion of the energy.
f the sales to Mineral County be found to be in
nterstate commerce, they are exempt from regula-

1. The sales to Mineral County are not wholesale as required by Section 201(d) because they are not sales to a "person" as specified in Section 201(d) and as defined in Section 3(4).
 2. Section 201(f) provides that Part II of the Act does not apply to a political subdivision of a state. This language may be construed to exempt Mineral County from regulation under the Act.
- C. Assume Part I applies to the licensed portion of the energy sold and Part II applies to the non-licensed portion.
1. As to the licensed portion, the same arguments against Federal Power Commission jurisdiction apply which are set forth in III. A.
 2. As to the non-licensed portion, the same arguments against Federal Power Commission jurisdiction apply which are set forth in III. B. above.

In the argument which follows the number and letter designations correspond with those in the Outline of Argument above.

ARGUMENT.

THE FEDERAL POWER ACT MUST BE CONSTRUED IN ITS ENTIRETY, GIVING EQUAL WEIGHT TO PARTS I AND II, AND MUST BE INTERPRETED SO AS TO AVOID CONFLICT BETWEEN ITS VARIOUS SECTIONS. BY APPLYING SUCH RECOGNIZED PRINCIPLES OF CONSTRUCTION, THE ACT IS FOUND TO EXCLUDE FEDERAL POWER COMMON JURISDICTION OVER INTERSTATE WHOLESALE SALES BY A LICENSEE WHERE THE STATES DIRECTLY GOVERNED HAVE REGULATORY COMMISSIONS AND THERE IS NO SHOWING THAT SUCH STATES ARE UNABLE TO AGREE ON THE RATES TO BE CHARGED FOR SUCH SALES.

Federal Power Act must be construed according to the established rules of statutory construction.

Exercise of its constitutional power over public lands (Art. I, Sec. 3), Congress has undoubted power to subject interstate sales by licensees, whether interstate or intrastate, to regulation by a federal agency or to require that they be subjected to state regulation. *Light v. United States*, 250 U.S. 523 (1910); *Camfield v. United States*, 167 U.S. 518 (1897). Similarly, where no licensing is involved but interstate sales in interstate commerce, Congress has, by virtue of the interstate commerce clause (Art. I, Sec. 3), the undoubted power to subject such sales to regulation by a federal agency or to require subjection to state regulation where the interstate commerce clause, standing alone, would proscribe state regulation. See *Southern Pacific v. Arizona*, 325 U.S. 761 (1944).

If it be assumed that interstate wholesale sales by a licensee are involved, Congress would have un-

difficulty is that Congress seems in terms to have prescribed regulation for such sales in both Parts. If *non-wholesale* sales by a licensee were involved, there would be no overlap because Part II expressly applies only to wholesale sales. By the same token, if *wholesale* sales by a *non-licensee* were involved, there would be no overlap because Part I expressly applies only to sales by a licensee. But, where both the *wholesale* element and the *licensee* element exist for the same sales, Parts I and II seem applicable.

The basic problem then is to find out what Congress meant and, in that connection, two principles of statutory construction may be involved, first, that a statute should be read in its entirety and, second, that conflicting provisions must, where possible, be so interpreted as to avoid the conflict.

It is, of course, true, as the Company's opening points out (pages 27-31), that Part I has antecedents dating back to the early 1900's and that it is essentially a reenactment of the Water Power Act of 1920. It is also true that Part II has no such antecedents and that the historical pressures which produced it were quite different and much more recent. Notwithstanding, it must not be forgotten that the Federal Power Act was enacted in 1935 and that Parts I and II date from that act. There is no warrant for giving them unequal weight or for presuming that Part II should be regarded as subsequent legislation expressing a more recent

limited Part I to *non-wholesale* sales by licensees much ease as it might have limited Part II to the sales by *non-licensees*. In fact, it did neither. Interpreting the Federal Power Act, it is imperative by the impression that Part II is superior. That error into which the Court of Appeals for the District of Columbia has fallen. *Pennsylvania Water and Power Co. v. Federal Power Commission*, 193 F. 2d 230 (D.C. Cir. 1952), *cert. granted*, February 4, 1952.

Parts I and II must receive equal weight, the doctrine of repeal by implication, which is frowned upon, cannot even be invoked.

The principle which does properly apply is that two provisions in an act, seemingly in conflict, must be interpreted if possible, so as to avoid conflict. Such course is not difficult here and is, indeed, compelled unless the recent history of the legislation through Congress is to be ignored.

The jurisdictional sections of the Act applying to interstate commerce, Part I, Section 20 and Part II, Section 201(b), must be construed together to give effect to the intent of Congress. This construction makes Section 20 apply to interstate sales of electricity at wholesale by a licensee where the states directly concerned have regulatory agencies and such states are not shown to have agreed to agree on the rates to be charged.

Part II was enacted to give the Federal Power Commission jurisdiction only in the gap in state regulation created by the *Attleboro* decision.

It has repeatedly been stated that Congress enacted

Steam & E. Co., 273 U.S. 83 (1927)), but did not go beyond, leaving to the states whatever they possessed prior to the enactment of Part II. *Connecticut Light & Power Co. v. Federal Power Commission*, 324 U.S. 515 (1945). This intent is set forth in Part II, Section 201(a), which has been adopted as the policy section:

“ . . . Federal regulation of . . . the sale of electric energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, shall extend only to those matters which are not subject to regulation by the states.”

It is even more clearly set forth in the jurisdictional provisions of Part II, Section 201(b):

“The provisions of this Part shall apply to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a state or state agency of its lawful authority now exercised by such state or agency in the exportation of hydroelectric energy which is transmitted across a state line. . . .”

The obvious question then is, what *was* the gap in regulation by the *Attleboro* decision and what sales *were* left to regulation by the states prior to the enactment of Part II.

2. By virtue of the Water Power Act of 1920 there was no gap in state regulation prior to the enactment of Part II as to interstate wholesale sales by a state, provided the states directly concerned had

Water Power Act, substantially adopted as Part I of the Federal Power Act in 1935, was enacted in 1920. It applied only to licensees. Therefore, it had no application when the Supreme Court was faced in 1927 with the question presented in the *Attleboro* case, which involved interstate leased power. The Court there held, *where there is no federal statute delineating state and federal jurisdiction*, that a state cannot regulate the rates charged by a public electric utility for current sold to a foreign electric utility for resale in another state and delivered at the state boundary, inasmuch as the interstate business carried on between the two utilities is essentially national in character and state regulation would constitute a direct burden upon interstate commerce, placing a direct restraint upon that which, in the absence of federal regulation, should be free.

It is as obvious that, had *licensed* power been involved in the *Attleboro* case, state regulation would have been proper if the two states directly concerned had agreed to have regulatory agencies and such states had been found unable to agree on the rates to be charged because the Water Power Act of 1920 would not have applied. In other words, a machinery already set up for closing the gap in state regulation would have been available. It follows that, given the conditions set forth in Section 20, there was no gap in the regulation of interstate leased power prior to 1935 because Congress had not yet closed it. That Congress has power, if it chooses, to fill any such gap by immediate action is a question of legislative jurisdiction, not of judicial review.

does not constitute an improper delegation of
sional power to the states.

Counsel for the Federal Power Commission w
tend that the gap intended to be closed by Par
sisted not only of the gap revealed in the *Attle*
where there was *no* applicable existing federal le
but a particular gap which *would* have existed
Congress already closed it. Such construction
defies the plain meaning of Sections 201(a)
quoted above, but is out of harmony with the r
representations to Congress in 1935 that the pro
would not take from the states any jurisdic
they were previously empowered to exercise. N
tion was made between power which the sta
exercise in the absence of federal legislation, a
stance, where retail rates of sales in interstate
were involved (*Pennsylvania Gas Co. v. Public*
Commission, 252 U.S. 23 (1920)), and power v
states could exercise because of already existin
legislation.

Counsel for the Federal Power Commission w
tend that, even if the gap intended to be closed
consisted only of the gap revealed in the *Attle*
cision, Part II must, notwithstanding, be cons
a later expression of Congress and, therefore, co
whenever sales by a licensee are at *wholesale*.
words, counsel would argue that Part I, Section
plies only to sales by a licensee *at retail* since

t must fall because, as we have noted, there is
nt to assume Part II expresses a later Congress-
tent than Part I or that it is to be given any
force. Furthermore, there is nothing in the lan-
Part I itself which would justify the conclusion
was intended to apply only to retail sales by
e. Indeed, the language clearly shows that whole-
s by a licensee were *particularly* contemplated.
0 reads in part:

That when said power or any part thereof shall
e into interstate or foreign commerce the rates
ged and the service rendered by any licensee
or by any person . . . purchasing power from
licensee for sale and distribution or use in
e service shall be reasonable . . .”

ws that upon a proper construction of the Fed-
er Act, Part I, Section 20 applies to preclude
Power Commission jurisdiction over interstate
sales by a licensee, provided the states directly
d have regulatory agencies and such states are
n unable to agree on the rates to be charged. It
hown that, even assuming the sales both to the
d Mineral County are such sales, the conditions
n 20 are met and preclude Federal Power Com-
urisdiction.

C. The foregoing interpretation of the Federal Power Act applies even though part of the power sold by the licensee is derived from non-licensed sources.

Section 20 reads in part:

“That when said power [licensed power] in whole or in part thereof shall enter into interstate or foreign commerce the rates charged . . . by any such licensee . . . shall be reasonable . . .”

It will be noted that the regulation prescribed by Section 20 runs to the “licensee,” not merely to the licensed power by the licensee. Thus, it is implicit that some portion of the power which the licensee sells is non-licensed. Once a licensee the utility is bound by Section 20 whenever it sells power in interstate commerce and at least a portion of that power is licensed.

Here, again, the seeming conflict with Part II of the Act, 201(b), can be resolved if it is recognized that the interpretation of Section 20 was equally valid before 1935 when identical language existed in the Water Power Act. Thus, prior to 1935, a licensee engaged in interstate commerce was subject to regulation as provided in the provisions of Section 20, both as to the portion of power which was licensed and that which was not. Accordingly, there was no gap at the time Part II was enacted. Therefore, Part II does not apply.

Should it be found that the foregoing interpretation of Section 20 is too broad and allows state regulation over licensed power sold by a licensee, it does not

whole is given to the federal agency under Part I. The argument is that it would be impractical to have the Federal Power Commission regulate some fraction of the sales and the states the balance; *ergo*, regulation must go to the federal agency. The reverse argument is made just as plausibly: if it would be impractical to have federal and state agencies regulating respectively some fraction of the same sales, *ergo*, regulation must go to the states. Again, counsel for the Federal Power Commission labor under the misconception that Part II is a paramount expression of Congress to be applied in case of conflict with Part I. The real solution is indicated, in determining what Section 20 meant (under the Water Power Act) prior to the enactment of Part II. To the extent that Section 20 closed the gap in regulation, Part II does not apply.

of existing court decisions.

Three decisions have dealt with the problem here involved:

Safe Harbor Water Power Corp. v. FPC, 124 F.2d 800 (3d Cir. 1941), *cert. denied*, 316 U.S. 663 (1942). Referred to as the "First Safe Harbor Case."

Safe Harbor Water Power Corp. v. FPC, 179 F.2d 179 (3d Cir. 1950), *cert. denied*, 339 U.S. 957. Referred to as the "Second Safe Harbor Case."

Pennsylvania Water & Power Co. v. FPC, 193 F.2d 220 (D.C. Cir. 1951), *cert. granted*, Feb. 4, 1952.

licensee may be subjected to regulation under Part II. There, the Federal Power Commission did in fact take to regulate under Part I, and the court (F.2d at 809):

“... whether or not the Federal Power Commission has jurisdiction over Safe Harbor as a public utility transmitting and selling electric energy at rates in interstate commerce under the provision of Part II ... is immaterial. The Commission has authority to fix the rates charged by Safe Harbor under the authority which Section 20 confers upon it with respect to licensees of water power projects upon navigable rivers which is an entirely different basis for Federal jurisdiction.”

In that proceeding the order of the Federal Commission was set aside as beyond its jurisdiction because there was no showing that the respective states were unable to regulate.

In the *Second Safe Harbor Case* the facts showed that the states directly concerned *were* unable to agree. Therefore, Federal Power Commission jurisdiction lay regardless of whether the court construed the Federal Power Act to make Part I applicable or Part II. The court expressly left the question open because it found no inconsistency between Parts I and II in certain valuation provisions which had to be applied. Said the court (F.2d at 186):

“It can be argued with some plausibility that since Safe Harbor is a ‘licensee’ it must be regulated as such even though it is also a ‘public utility’.”

ons 205, 206 and 208, Part II, are not conflicting consistent.”

argument above shows, we are in general agree-
h the Third Circuit’s approach of seeking to
Parts I and II of the Act. However, we contend
applying such approach Part I alone applies to
sales in interstate commerce by a licensee. The
not have to decide the question because the
ould have been the same in either event. The
rue in the proceeding here.

Pennsylvania Water case the Court of Appeals
District of Columbia has taken the view that
wholesale rates by a licensee are subject only
II. However, the court’s whole argument pro-
on the erroneous premise that Part II repre-
later expression of Congressional intent than
The United States Supreme Court has granted

atters stand, the Third Circuit and the District
bia Circuit have taken inconsistent approaches
g the interrelation of Parts I and II. The pro-
ere presents another opportunity for a consider-
hat problem.

POINT II. SALES TO THE NAVY.

THE FEDERAL POWER ACT DOES NOT GIVE FEDERAL POWER COMMISSION JURISDICTION OVER SALES TO THE NAVY, WHETHER PART I, SECTION 201(a), APPLIES, COVERING BOTH THE LICENSED AND NON-LICENSED PORTIONS OF THE ENERGY SOLD, OR PART II APPLIES, COVERING BOTH THE LICENSED PORTIONS OF THE ENERGY SOLD, OR PART I APPLIES TO THE LICENSED PORTION AND PART II APPLIES TO THE NON-LICENSED PORTION OF THE ENERGY SOLD.

- A. Assume only Part I applies, extending to the non-licensed as well as the licensed portion of the energy. If the sales to the Navy be found to be in interstate commerce, it would be under Section 20 that the State of California has no authority to prescribe rates for the California Electric Power Company because California is not the only state "directly concerned".

It may be urged parenthetically that the sales to the Navy are in *intrastate* commerce since they are consummated wholly within the state, where delivery is made, and since the purchaser is an arm of the federal government. If that conclusion is correct, then, either Part I or Part II. That much would be advisory to the Federal Power Commission.

The argument herein, however, will be premised on the assumption that even the sales to the Navy are in interstate commerce.

If it be further assumed that Part I is the applicable part, as indeed we demonstrated in Point I, provided the conditions of Section 20 are met, then, to preclude the Federal Power Commission jurisdiction over the sales to the Navy.

Section 20, Congress has conferred jurisdiction
Federal Power Commission only if:

any of the states "directly concerned"
not provided a commission or other authority to
ce the requirements of Section 20 within such
' ("requirements within such state" apparently
ring to the provision that the rates and serv-
y licensees or persons purchasing from licensees
esale in public service shall be reasonable), and
even though the requisite state commissions
her authorities have been provided, only if the
"directly concerned" are "unable to agree"
e service or rates through their properly con-
ed authorities.

case of the sales to the Navy, California is the
e "directly concerned" since Nevada has no
n over the Navy, either as to the rates the Navy
California Electric or as to the rates the Navy
ts tenants. The mere presence of the Naval
n within Nevada does not make Nevada "di-
cerned," for that phrase has obvious reference
uation where the state's concern relates to the
or the charges by, its own citizens or residents.
is "directly concerned" only because Cali-
electric Power is a company engaged in selling
within the state.

ldy, the California Public Utilities Commission
l of state commission contemplated in condition
e, for it has broad powers over the rates of

California Public Utilities Code, Stats. 1951, ch. 201, et seq., as amended.

Since only one state is "directly concerned," no question can arise of inability as between two states to be concerned to agree on the reasonableness of charges charged to the Navy.

It follows that Federal Power Commission jurisdiction is precluded because neither of the conditions to exercise as prescribed in Section 20 is present.

B. Assume Part II applies, extending to the licensed non-licensed portion of the energy sold to the Navy. If sales are found to be in interstate commerce, they are exempt from regulation under Part II for three separate reasons in addition to that given in Point I hereof. Any one of these reasons is sufficient in itself to preclude regulation under Part II.

1. The sales are not "sales at wholesale" as defined by Section 201(b) because they are not sales "for resale" as specified in Section 201(d).

Part II, Section 201(b) declares that:

"The provisions of this Part shall apply to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy . . ."

The phrase "sale of electric energy at wholesale" as defined in Section 201(d) to mean a "sale of electric energy to any person for resale."

As noted in the brief of California Electric Power

use of the Government's Ammunition Depot." The evidence showed that the use in fact made of the Depot has been consistent with such language. All of the electricity is consumed on the Naval reservation; part is used for the Depot's industrial operations; the balance is used by the individuals and business establishments located on the reservation. Individuals may reside or conduct business only so long as their presence is consistent with the Navy's obligations. The lease agreements with respect to copying "public quarters" and with those occupying the low-cost housing project known as Babbitt, both of which terminate when the rental privilege ceases upon termination of the reservation by the Government. For the business concessions, the Government issues a "Revocable Permit" and states that the concession is "for accommodation of the Depot."

Thus, all those who receive electricity from the Depot are tenants at will, whose tenure depends solely on the needs of the Navy landlord. The Navy does not exercise its public utility in furnishing electric service. It has on numerous occasions been held that public utility is not absent where the service is confined to tenants. In *Conas v. Swetland*, 119 Ohio St. 12, 162 N.E. 45, 16 D 825 (1928), it was held that, where a realty company supplied electricity under contract to tenants and did not hold itself out to the public generally, it was not a public utility. In *Re Fulton*, PUR 1930D 111 (1930), it was said that the jurisdiction of the Miscellaneous Service Commission did not extend to the

to tenants through submeters. In *Holdred Co. v. Boone County Coal Corp.*, 97 W. Va. 109, 124 S.E.2d 109 (1924), it was held that a coal company furnishing electricity under contract to lessees was not a public utility.

Quite aside from the landlord-tenant relation, the Navy as an arm of the federal government would not fall within the category of a public utility. Consequently, Congress has never authorized it to engage in the sale of electric energy to the public generally.

In construing what Congress meant in using the terms "sales at wholesale" and "sales for resale" in the Act, it must again be remembered that that Part was enacted to fill the gap revealed in the *Attleboro* case. As previously noted, that decision dealt with sales by a public utility to another *public utility* for resale by that utility. Certainly, Congress did not intend the Act, as amended, to apply to a situation where the resale is made in public service. The underlying purpose of the Act was to provide protection to ultimate consumers of public utility service by providing that a federal public utility should regulate the interstate wholesale rates if the states were prevented from doing so by the interstate commerce clause. It must be presumed that the Navy does not need to be protected against the improvidence of the Navy in negotiating contracts for the purchase of energy. This is especially true because the charges by the Navy to its tenants are not based on cost plus a "fair return". It must be further presumed that the Navy itself does not need the guidance

then that the Navy "resells" some of the purchases, it is clearly not the kind of "resell-
emplated by Part II.

connection reference may be made to the com-
ly Brief (p. 15, et seq.) in which it is pointed
even if "sales at wholesale" and "sales for
re to be given a broader meaning than it is
ongress intended and that sales to tenants by
are to be included, it still would not entitle
l Power Commission to claim jurisdiction over
purchases by the Navy. The energy sold to
is a small fraction of the energy purchased
rmore, such fraction can be readily calculated.
Interstate Gas Co. v. FPC, 185 F(2d) 357 (3d

sales are not sales at wholesale as required by
l(b) for the additional reason that they are
o a "person" as specified in Section 201(d)
ned in Section 3(4).

for the Federal Power Commission admit that
o the Navy do not literally fall within Part II
"sale of electric energy at wholesale" is de-
ction 201(d) to mean "a sale of electric energy
son for resale" and the Navy falls outside the
of "person" in Section 3(4). Counsel explain
meaning as a "quirk of draftsmanship utterly
' (Brief for Respondent, p. 21), and indulge
otation of legislative history which is intended

construction of a statute. Further on, counsel is in considering "the policy of the Act as a whole" it is clear that Congress could not have intended to exempt from the regulation of Part II sales to the Mineral County). At that juncture, as elsewhere in this brief, a dissertation is launched upon which it is argued, if at all, only to one of the two types of sales involved in this instance, sales to Mineral County. Counsel possibly wish this Court to look upon the Mineral County municipality or similar political subdivision? The main argument is that to exempt sales to a municipality from regulation would mean that "Congress intended to deprive consumers served by the thousands of municipally owned distribution systems, of the protection afforded by providing from unjust and unreasonable interstate rates" (Brief for Respondent, p. 23.) Obviously, the argument is utterly irrelevant to the Navy. The Navy has no duty of entering into electric purchase contracts if they are fair, regardless of any efforts by the Federal Power Commission to intervene. Furthermore, the Commission charges its tenants for electricity supplied upon a basis it deems proper, and, as shown in the preceding, the charge is determined upon some basis other than the cost to the Navy plus a fair return.

That counsel for the Federal Power Commission themselves not have much faith in the argument espoused is indicated by the precisely opposite position taken by them in a brief filed in August, 1951,

nia Electric Power Company have quoted from at length in their opening brief. (Opening Brief,

We take the liberty of requesting a portion: 'person' is limited in Sec. 3(4) to mean an 'individual or corporation.' This alternative definition excludes the United States. For the United States is neither a corporation nor an individual.

Use of the word 'person' elsewhere in the Act supports this definition. As used throughout the Act, the word 'person' cannot include the United States. Otherwise, absurd or impossible situations would arise; exempting provisions of the Act would apply to Army Engineers, Bureau of Reclamation, T.V.A. and other agencies of the Federal Government; provisions of Part II of the Act relating to rates and taxes in interstate commerce would apply to the Secretary of the Interior, T.V.A., and other Federal agencies."

Section 201(f) provides that Part II shall not apply to the United States. Such language may be construed to exempt sales to the Navy from regulation under

The California Commission in its Decision No. 100,000, cited on page 2 above, relied upon sections 201(f) in reaching the conclusion that Part II does not apply to the sales to the Navy, a forceful conclusion was made by the company in its brief before the Commission. It is submitted that the same forceful conclusion should be made by the five federal and state regulatory agencies that section 201(f) must be construed to exempt sales to the

36-39). It is so ably put that we take the liberty in part (Tr., pp. 37-39):

“ . . . the regulation by this Commission of electric energy, and the rates charged by the sovereign—Federal or State—thereby necessarily limits the freedom of action of negotiation for the purchase of electric energy by the sovereign. It would thereby cause provisions of Part II of the Act to the United States, a State or any political subdivision of a State, and such action would be deemed to be included in the provisions of Part II of the Act. Particular reference to the National Government seems clear that this agency not being affirmatively authorized, in its regulation of electric energy at wholesale under Federal supervision, directly or indirectly, the purchase of electric energy by the National Government, in its agency, authority, instrumentality, officer, or employee acting as such in the course of official duty, but is expressly prohibited from taking such action. In brief, under Part II this Commission, as an agency of the National Government, is prohibited to supervise or accomplish by indirect means the limitation of the freedom of action of the National Government or any of its agencies or agencies to purchase electric energy at whatever price established in direct negotiations. Although the Department of the Navy requests the Commission so to act, it must be remembered that the jurisdiction of this Commission rests upon ex-

Department of the Navy or any other department, agency or agent of the National Government than Congress as expressed by a duly enacted law.”

For support of the position herein, reference is made to the company's opening brief, pages 63, 64.

Part I applies to the licensed portion of the energy

Part II applies to the non-licensed portion.

As to the licensed portion, the same arguments under Federal Power Commission jurisdiction apply as set forth in II. A. above.

As to the non-licensed portion, the same arguments under Federal Power Commission jurisdiction apply as set forth in II. B. above.

The foregoing propositions are self-explanatory. How-
ever pointed out in I. C. above, we do not agree with the assumption herein and contend that Part I should be construed to apply to both the licensed and the unlicensed portions of the energy sold by the “licensee” Electric Power Company.

POINT III. SALES TO MINERAL COUNTY.

THE FEDERAL POWER ACT DOES NOT GIVE FEDERAL POWER COMMISSION JURISDICTION OVER SALES TO MINERAL COUNTY, WHETHER PART I OR PART II OF SECTION 20, APPLIES, COVERING BOTH THE LICENSED AND NON-LICENSED PORTION OF THE ENERGY SOLD UNDER SECTION 201(b), APPLIES, COVERING BOTH THE LICENSED AND NON-LICENSED PORTIONS, OR PART I APPLIES TO THE LICENSED PORTION AND PART II APPLIES TO THE NON-LICENSED PORTION OF THE ENERGY SOLD.

- A. Assume only Part I applies, extending to the non-licensed as well as the licensed portion of the energy. If it is found that Mineral County be found to be in interstate commerce, the requirements of Section 20 for precluding Federal Power Commission jurisdiction are met, because: (a) the states directly concerned, viz., California and Nevada, have provided commissions with authority to enforce the requirements of Section 20 within their respective states, and (b) such states have not been shown to be unable to enforce the rates prescribed by the California Commission.

In Point I above, it was demonstrated that the requirements of the Act is, indeed, the applicable part, provided the conditions of Section 20 thereof are met. Such conditions were previously set out in Point II. A, on page 10, in discussing the sales to the Navy, and it is now to be determined whether they are met in the sales to Mineral County.

First, have the states "directly concerned" provided a commission or other authority to enforce the requirements of Section 20 "within such state"? The answer is yes, as the following discussion will demonstrate.

California and Nevada are admittedly the

ia. Nevada's direct concern arises from the
e purchaser is a political subdivision of that
at such purchaser is engaged in public service
ne electricity, purchased in California, to citi-
sidents of Nevada.

t has a regulatory commission, the California
ities Commission, which has broad powers
tes, wholesale and retail, of electric utilities
within the state. California Public Utilities
tes 1951, chapter 764, Section 201, et seq., as

Nevada Public Service Commission does not
great control over Mineral County as it does
e organizations engaged in public service in
nevertheless has express jurisdiction over
nty's rates. It should be noted in passing
l County in its electric operations is desig-
ral County Power System. Nevada Statutes
vide at page 55:

6. The maintenance and operation of said
County Power System shall be under the
supervision and authority of the board of
rs and rates charged to consumers for sale
tribution of electric energy and current, and
s from telephone service, with the terms and
ns thereof, shall be fixed by said board, *sub-*
supervision of the Nevada Public Service Com-
, who may revise, raise or lower the same."
sis added.)

the requirements of this section [Section 20] v State.” The California Commission has jurisdiction to prescribe reasonable rates, wholesale or retail, to be charged by public utilities operating within the State. The Nevada Commission has jurisdiction to prescribe reasonable rates to be charged by Mineral Wells in selling to citizens and residents of Nevada. The California commission has “authority to enforce the requirements of this section [Section 20] within such state or within its respective state.

The staff of the Federal Power Commission was apparently unaware of the Nevada statutory provisions quoted above prior to the hearing and one of them was wondering whether the order to show cause had been issued if the Nevada law had been fully considered. In any event, staff counsel attempted at the hearing to make an offer of extraordinarily incompetent evidence to show that the Nevada Public Service Commission did not have jurisdiction over the rates of Mineral County Power System.

Such counsel now seem tacitly to admit that the evidence was, indeed, incompetent and that the Nevada Public Service Commission *has*, pursuant to the provisions quoted, jurisdiction over the rates of the Mineral County Power System. (Brief of Respondents, p. 39.) They now come up with the proposition that the Nevada Public Service Commission does not quod Section 20 because it is not constituted “with

, p. 38.) Certainly, that is a requirement which the statute, and the only basis for espousing it is a misconstruction of the second condition of Section 20, which counsel apparently indulge. We turn to the construction of that second condition.

and in the following language in Section 20:
"Each State is unable to agree through their duly constituted authorities on the . . . rates or"

Lower Commission counsel contend that this contemplates an obligation on the part of the sister state concerned affirmatively to agree, in this respect, with their utilities commissions, on the fairness of wholesale rates. Going back to the first condition, they contend that the utilities commissions, to qualify under Section 20, must have express authority from their respective states to enter into such affirmative agreement.

The construction of Section 20 errs in two respects: (1) by reading into the first condition the requirement that sister state commissions, to be qualified, must have agreed affirmatively respecting wholesale rates with the other state, whereas all the statute says is that the sister state commission must have authority to fix rates "within such state," and (2) by imposing a reciprocal duty on the sister state to agree on the rates approved by the other, whereas the statute avoids the other way around by saying that the Fed-

to agree in order to preserve local jurisdiction state's mere *failure to disagree* precludes Federal Commission jurisdiction.

Even counsel for the Federal Power Commission suggest the Third Circuit may have gone afield in its interpretation of that Section 20 envisages affirmative agreement with the compact clause of the Constitution (Art. I, Sec. 3). *First Safe Harbor Case*, p. 21, *supra* (Respondent, p. 35.) Counsel say an affirmative agreement is contemplated, though they question what is required under the compact clause. We contend that no agreement of any kind is contemplated by the compact clause, only an absence of disagreement, to preserve local jurisdiction.

To summarize, it is submitted that, if the plain meaning of Section 20 is to be respected, the conditions set forth in Section 20 which *preclude* Federal Power Commission jurisdiction are as follows:

- (1) The existence of state commissions in which the state is directly concerned with authority to regulate the rates of reasonable rates for electric utility service within their respective states. No further action by the Federal Commission is required. And:
- (2) The absence of disagreement between the state and the sister state directly concerned. After a wholesale sale of interstate commerce by a licensee has been determined by one state, mere silence on the part of the sister state is enough to preclude

it sees fit merely by voicing disagreement through any properly constituted authority, including the legislature itself.

Interpretation not only follows the natural meaning of language of Section 20 but implements the intent of Congress to make Federal Power Commission jurisdiction applicable only where one or the other of the parties directly concerned believes that its interests are jeopardized.

In fact there can be no question that the staff of the Federal Power Commission failed to show an absence of disagreement. No evidence whatever was presented respecting any course of dealing, or an absence of dealing, between the California and Nevada commissions, or any other authorities of the respective states. The Chairman of the Nevada Public Service Commission testified at the concurrent hearing that his Commission had declined not to participate in the cooperative procedure, and that he would appear only as an interested party. He stated (Tr., p. 153):

"The State of Nevada, therefore, is not interested in this matter to the extent that the users are living in Nevada. I am not prepared to state at this time what the position of our Commission would be, until this matter of jurisdiction has been decided. I will make all the statement I wish to make."

B. Assume Part II applies, extending to the licensees the non-licensed portion of the energy. If the Mineral County be found to be in interstate commerce, it is exempt from regulation under Part II for reasons in addition to that given in Point I hereinafter.

1. The sales to Mineral County are not sales as required by Section 201(b) because they are sales to a "person" as specified in Section 201(2) defined in Section 3(4).

Reference may here be made to the correspondence in Point II. B. 2, supra, pages 29-31, regarding the sales to the Navy. It was there pointed out that the counsel for the Federal Power Commission, in interpreting the literal meaning of the statute is to be ignored, and to exempt sales to a municipality from regulation would mean that "Congress intended to deprive the public of the service served by the thousands of municipally owned electric power distribution systems, of the protection it was provided by the unjust and unreasonable interstate rates." This argument has no merit. It ignores the distinction between private and governmental bodies; it presupposes that they are governed by the same motives. Utilities are in business to make money, and if they agree to make wholesale purchases at an improvident rate, they pass it on to the retail consumers. Municipalities or other public subdivisions of a state are not in business to make money but only to serve their consumers. The same doctrine of improvident wholesale rates does not exist. The purpose of Congress in enacting Part II was to protect

l protector, and their consumers are amply
those municipalities.

surprising to find that Congress by its express
led from Federal Power Commission jurisdic-
Part II, sales to a political subdivision of a
II was enacted to close the gap of non-regula-
g wholesale transactions between one private
another, not between a private utility, on the
nd the state or a political subdivision there-
her.

n 201(f) provides that Part II shall not
political subdivision of a state. Such language
trued to exempt sales to Mineral County from
under Part II.

reasoning applies here which was set forth
B. 3. above relating to sales to the Navy.

Part I applies to the licensed portion of the energy
Part II applies to the non-licensed portion.

the licensed portion, the same arguments
ederal Power Commission jurisdiction apply
et forth in III. A. above.

the non-licensed portion, the same arguments
ederal Power Commission jurisdiction apply
et forth in III. B. above.

going propositions are self-explanatory. How-
nted out in I. C. above, we do not agree with
ssumption herein and contend that Part I

CONCLUSION.

For all of the above reasons, it is submitted that the Federal Power Commission has erred in its decision. The challenged order should be set aside.

Dated, San Francisco, California,
March 28, 1952.

Respectfully submitted,

EVERETT C. McKEAGH

BORIS H. LAKUSTA,

WILSON E. CLINE,

*Attorneys for Public Utilities
of the State of California
Curiae.*

(Appendix A Follows.)

Appendix A.



Decisions

of the

California Public Utilities Commission

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Phone Company, Ltd., granted an estimated annual gross increase in \$750,000 to produce an estimated rate of return of 6.1% during the period after the effective date of the order.

AND TELEGRAPH UTILITIES—CONSTRUCTION AND OPERATION OF FACILITIES—COMMISSION JURISDICTION. A program of curtailing of new telephone plant, as an anti-inflation measure would not have public approval in a state that is expanding and growing as rapidly as California.

AND TELEGRAPH UTILITIES—RATE BASE—VALUATION—PARTICULARS—LAND AND BUILDINGS. The inclusion of interest on land is contrary to the established practice of charging overhead costs to plant charges during the construction period. Prior to the structural capital expenditures, no interest on the land is required and necessitates capital investment of the associated land in the funds required prior to date of operation. This interest should be capitalized as an asset on the books of the company and determining costs for rate-making purposes.

AND TELEGRAPH UTILITIES—RETURN—SPECIFIC ALLOWANCE. A return should be given to the declining rate of return attendant upon the investment in plant. Applicant's operating revenues should be increased to an amount which will produce a return of 6.1% on an annual basis. Applicant's outstanding securities and those proposed to be issued should produce a return which should produce net operating revenues sufficient to enable applicant to proceed with its construction.

Exhibits and list of witnesses are set forth in Appendix "1")

OPINION

The Telephone Company, Ltd., a California corporation, in this proceeding, by the above-entitled application, filed February 1, 1951, asked authority to increase its telephone rates and toll revenues to an annual amount of \$3,241,200. On February 1, 1951, applicant first amended application requesting that this amount be increased to \$5,757,600 by reason of changed conditions. The original application was based upon conditions as they existed prior to June 25, 1951, of the incidence of the Korean war, which did not reflect increased toll revenues, government restriction of copper, and increases in the rate of turnover among employees. At the public hearing on April 5, 1951, applicant presented evidence Exhibit No. 46, which lowered the requested amount to \$4,545,000 after giving effect to an increase in toll revenue of \$1,200 and an increase of \$192,700 in miscellaneous revenue, and an increase in the directory advertising revenue estimate.

At the public hearings were held upon the first amended application on February 1, 1951, Commissioner Huls and Examiner Edwards during February, April, and May, 1951. All hearings were held in Los Angeles for one day, March 2, 1951, when the hearing was held

oral argument on May 9, 1951.

This rate increase proceeding is not the first for this utility since the beginning of the postwar inflation in wages and prices. On May 1, 1949, by Decision No. 43423 in Application No. 30339, the Commission granted this utility an interim increase in the amount of \$2,200,000 per annum. On May 2, 1950, by Decision No. 44135 under the same application number, an additional increase of \$2,200,000 in gross revenue was granted. It was estimated that the utility would earn 5.9% on a base of \$70,035,000 for a full year at the 1950 level of business. The utility claims that in 1950 it earned only 4.45% and did not realize the return the Commission had estimated for the full year because the wage increases were effective for only seven months of 1950 and because the cost of a wage increase of \$195,600 annually. The company's rate of return computed by the Commission's staff for the actual year was 4.97%. Applicant now claims that its rate of return is approximately 5.9% and that for the full year of 1951 it will fall to approximately 5.0%.

The Associated Telephone Company, Ltd., is engaged in the business of furnishing public utility telephone service to approximately 250,000 telephone stations in 34 exchanges located in the Counties of Alameda, Alameda, Orange, San Bernardino, Santa Barbara, Ventura, Tulare and Fresno. All but three of the company's exchanges have been converted to dial operation. The area in which applicant renders telephone service has witnessed a phenomenal postwar growth in population. The number of stations served by this utility has grown from 215,939 as of December 31, 1946, to 422,834 as of December 31, 1950. Accompanying this increase in the number of stations has been an even sharper increase in the amount of plant in service from \$33,093,340 to \$90,300,000. The demand for new service continues unabated as indicated by the fact that as of January 20, 1951, applicant's held orders were 21,900. New home construction in its service area has continued to be hampered by defense restrictions on certain types of new buildings.

Company's Position

Because of the fact that it has been necessary for applicant to increase its plant at high unit costs for labor and materials above prewar prices, applicant claims it will not be possible to maintain a sufficient rate of return at present rate levels to enable it to secure adequate prices for financing plant expansion. Furthermore, its operating expenses have increased out of proportion to its

ss construction in the amount of \$25,914,100, which will
 age investment in 1951 to an approximate figure of \$228
 average total operating expenses, including depreciation and
 ion have risen from \$44.26 in 1946 to \$45.83 in 1950, and to
 total of \$48.82 in 1951. The average total operating rev-
 ion have increased from \$51.39 in 1946 to \$53.25 in 1950,
 are estimated at \$55.11 at present rate levels.

t requests that its telephone service rates be raised to a
 l result in a rate of return of 6.5% on its rate base at the
 business. Its proposed increase of \$5,545,000, largely pro-
 signed to the local service classification, represents a rate
 3% on the average, being equivalent to an approximate in-
 per year per average station. The amount of increase in
 used by applicant, is not uniform for classes and grades of
 changes. Applicant suggests that the exchanges be classified
 ps for local service and two groups for extended service
 ons accessible to subscribers in an exchange, as shown on
 table:

APPLICANT'S PROPOSED BASIC RATES

	<i>Business Service</i>			<i>Residence Service</i>		
	<i>Indiv. Line</i>	<i>2-Party Line</i>	<i>4 Party Line</i>	<i>Indiv. Line</i>	<i>2-Party Line</i>	<i>4-Party Line</i>
	<i>Local Service</i>					
500__	\$6.75	\$4.25	\$4.00	\$6.00	\$4.00	\$3.75
,000__	7.00	4.50	4.25	6.00	4.25	3.75
,000__	7.25	4.75	4.50	6.00	4.50	3.75
,000__	7.50	5.00	4.75	6.00	4.75	3.75
,000__	7.75	5.50	--	6.00	5.00	3.75
	<i>Extended Service</i>					
,000__	8.50	6.25	6.00	6.50	5.35	4.00
,000__	10.50	7.50	7.25	6.50	5.35	4.00

t's proposed rates are fully set forth in Exhibit E of the
 d, in addition to the above schedules, contain proposals on
 suburban, and message unit services.

resentation

r representatives were present at each of the hearings and
 ted testimony relative to various phases of the case pre-
 applicant. Testimony or statements were presented by the
 ninent public officials: State Senator Cunningham of San
 county, Supervisor Marion A. Smith of Santa Barbara
 r Fletcher Bowron of the City of Los Angeles, and Mayor

install high cost buildings during the present period of high material prices; steps should be taken by the company to offset general nationwide inflation in prices and wages; applicant's prices would result in removal of telephones; telephone service and rates be comparable with those applicable to other similar areas.

The applicant's position relative to these matters was: telephone exchanges fluctuates annually and it cannot be said fairly that one exchange is carrying the others, and particularly in Oxnard the proposed rates will justify the capital involved; buildings are not for show or to have excess spare room but rather, adequately equipped with necessary telephone equipment; the dial switching equipment is tremendously more expensive than the buildings and undue risk is taken where fire hazard is high and humidity, which might affect service, cannot be controlled.

The utility is the victim of inflation as is the public generally. Applicant's prices must be kept current if it is to provide the type of service the public is demanding. The only contribution the company stated it could make to halt the inflation spiral was to stop construction of all telephone plant and not provide new service demanding it.

[1] We are of the opinion that such a program of cessation of construction of new telephone plant, as an anti-inflation measure, would not meet with public approval in a state that is expanding and growing as rapidly as is the State of California.

In addition to the testimony of the public officials, testimony presented by representatives of other organizations and citizens. The Commission also received a number of letters protesting the proposed rate increases. These letters were summarized and classified as to subject matter under several general headings by a Commission staff engineer. The letters presented as part of a service investigating report. Exhibit No. 1 lists the subjects covered by such letters and by subscriber requests. It is noted that it is not practicable to list herein the detailed considerations given to each subject other than in a general way. The representative of the California Farm Bureau Federation testified that service in the rural area has been improving rapidly and that the farmer is willing to pay the rates which the Commission finds are proper. However, he pointed out that the rate for business suburban service is too low for residence service based on the relative usage. Suburban business areas are generally located along a highway where the public

view of the letter received by the Commission, the utility failed to investigate and follow up any complaints regarding the subscribers had given sufficient specific facts to indicate the trouble. The company observed generally that most of the dissatisfaction because of overloaded central office condition in large part now has been corrected. Another type of complaint is the provision of party lines service to persons requested individual line service. Solution of this problem is in the utility's ability to raise capital and install additional lines. Certain subscribers had individual difficulties which the company requested to correct. Other letters advanced carefully prepared suggestions which the Commission will attempt to carry out insofar as practicable.

A majority of several subscriber representatives contained suggestions to the improvement of service conditions. Such testimony weighed with all the evidence presented in this case, and is consistent with the economics governing the rendition of service, such suggestions will be adopted.

Earnings

The applicant and the Commission's staff presented estimates of the earnings of the Associated Telephone Company for the year 1951. These estimates, which are summarized in the succeeding table, show the result if the present rates were to be effective for the full year and what would result if the proposed rates were effective for the year as indicated.

ESTIMATED EARNINGS IN 1951

	<i>Company Exhibit No. 46</i>		<i>Staff Exhibit No. 50</i>	
	<i>Pres. Rates</i>	<i>Pres. Rates</i>	<i>Pres. Rates</i>	<i>Pres. Rates</i>
	<i>First 4 Mos.</i>	<i>First 4 Mos.</i>	<i>First 6 Mos.</i>	<i>First 6 Mos.</i>
	<i>Pro. Rates</i>	<i>Pro. Rates</i>	<i>Pro. Rates</i>	<i>Pro. Rates</i>
	<i>Last 8 Mos.</i>	<i>Last 8 Mos.</i>	<i>Last 6 Mos.</i>	<i>Last 6 Mos.</i>
	<i>Present Rates</i>	<i>Present Rates</i>	<i>Present Rates</i>	<i>Present Rates</i>
	<i>Full Year</i>	<i>Full Year</i>	<i>Full Year</i>	<i>Full Year</i>
Revenues -----	\$24,265,400	\$27,979,800	\$24,642,000	\$27,454,000
Operating Expenses -----	13,074,700	13,074,700	13,069,500	13,026,500
Depreciation -----	3,892,200	3,892,200	3,850,000	3,850,000
Other Expenses -----	4,431,300	6,281,100	4,473,900	5,895,400
Total Expenses -----	21,398,200	23,248,000	21,393,400	22,771,900
Operating Profit -----	2,867,200	4,731,800	3,248,600	4,682,100
Depreciated () -----	86,615,564	86,615,564	82,148,000	82,148,000
Operating Profit -----	3.31%	5.46%	3.95%	5.70%

In addition to the above figures, each exhibit contained a hypothetical calculation for the year of 1951 assuming applicant's proposed rates

of the rate base. The staff's estimate of revenue for the present rates is approximately 2% greater than the company's estimate, the company's expenses less by .02% and the rate base approximately 5% smaller. The staff's basis of part of the year at present rates and part at proposed rates. The staff's estimates of revenue and expenses are approximately 2% greater than the company's, being accounted for by the fact that the staff's estimates reflected two additional months at proposed rates. The staff did the staff's.

The company took no particular exception to the staff's estimate of revenues and expenses but did develop on cross-examination that the salary increase of \$200,000 conditionally granted to the employees of the company effective May 1, 1951 would lose its rate of return by about 0.1% below that shown in the staff's estimate. The company conditioned this salary increase on authorization obtained from the National Wage Stabilization Board. Another point pointed out by the company that might also adversely affect the rate of return would be a possible future increase in wages. The union, the bargaining agent for the company's wage-earning employees, notified the company with 60 days' written notice on May 1, 1951, that it intended to amend the contract currently in force. Such possible amendments are not reflected herein. For the purposes of this decision, the staff's estimates of revenues and expenses will be adopted, after adjusting for the expense effect of the \$200,000 salary increase.

Applicant claims that its salary levels prior to the increase effective May 1, 1951 were below the salary levels paid by other public utilities in Southern California. On the other hand, it claims that its rates are a proper level since the wage earners are, and for several years have been, compensated on the same general level as similar employees elsewhere in the telephone business in Southern California. A company representative testified that in these times of rapid growth in the telephone plant and of increasing manpower problems, its success in maintaining efficient and economical operations is in a large measure ever dependent upon the enthusiastic loyalty of salaried personnel.

Depreciation

The depreciation expense allowance by the staff was within 1% of the company's estimate. The reason for the close agreement was that the company used the rates based on the lives recommended by the staff. The prior rate proceedings under Application No. 30339. The

company standards for the purpose of deriving proper depreciation and salvage factors on its telephone plant. As a result, the company's president reported on March 8, 1951, that the company has established a Valuation Division which is now engaged in compiling mortality statistics for the express purpose of computing depreciation expense and determining the adequacy of its reserve. In future years the company plans to spread the undepreciated cost of the plant less estimated net salvage over the remaining life of the plant. Furthermore, no adjustment in the present reserve will be sought. Applicant's studies are now advanced to determine depreciation allowances at this remaining life basis.

Total taxes in the amount of \$3,610,847 recorded in 1950, County taxes amounted to 52.5%, State taxes, 9.2% and Federal taxes, 38.3%. In addition to these taxes, the company collected for the federal government \$5,556,233 collected from its subsidiaries representing federal excise taxes levied on exchange and toll. The total taxes payable to all taxing authorities amounted to \$9,167,080 per month during 1950.

The estimates of taxes are substantially above the \$3,610,847 recorded and could be higher still under the assumption that the proposed changes were to be effective only for part of the year. The reason for the increase is due to the effect of the current federal income tax on the company's net revenue. In 1950, on large utility corporations, the federal income tax rate of 42% was effective which for 1951 is estimated at 47%.

The company and Commission staff witnesses introduced evidence showing rate bases for various periods. The differences in the rate bases for the estimated year 1951 are due, in general, to the following factors:

1. Estimates of plant additions for the year are in the main spread over the year by the company uniformly throughout the year whereas the Commission has used two months actual and estimated completion dates to spread the balance of the year in the weighting given capital additions.

2. Commission staff figures reflect interest on land during the construction period, while the company's procedure was to include in

- tion of \$69,000 in the weighted average rate base. sion of interest on land is consistent with the est- tice of charging overhead costs to plant charge- construction period. Prior to the structural cap- tures, acquisition of the associated land is require- tates capital investment which includes interest- required prior to date of operation. This interes- be capitalized as an asset on the books of the- included in determining costs for rate-making.
- (c) The allowances for non-interest-bearing constru- progress differed materially due to differences in approach. The applicant, in preparing its figures for 1950 "Recorded", based the interest-bearing p- estimate of the monthly charges of interest during- and deducted this from the total construction wor- to give the non-interest-bearing portion. This v- base for their estimates for 1951. The staff base- for the year 1951 upon a study of the actual- bearing construction work in progress experience- addition, the company's interest during constru- culated at a 6% rate as against a 5% rate adopte-
- (d) The record shows the justification for the inclusi- mately \$420,000 reflecting routine project expend- year 1951, which did not appear specifically in t- mate.

COMPARISON OF RATE BASES
1951 ESTIMATED *

	<i>Company Exhibit H</i>	<i>Staff Exhibit No. 3</i>
Plant		
Telephone Plant -----	\$99,331,000	\$98,167
Non-interest-bearing CWIP -----	3,731,000	585
Property Held for Future Use -----	51,000	70
Total Weighted Average Plant -----	103,113,000	98,822
Adjustments		
Contributions of Tel. Plant -----	(893,000)	(897
Intangibles -----	-----	(49
Recomputation of Int. at 5% on CWIP and Land -----	-----	(19
Total Weighted Avg. Adjustments -----	(893,000)	(965
Working Capital		
Material and Supplies -----	3,304,000	3,278
Working Cash -----	750,000	750
Total Working Capital -----	4,054,000	4,028
Total Weighted Average Rate Base -----	106,274,000	101,885
Deduction for Depreciation -----	19,658,000	19,737

Weighted Avg. Deprec. Rate Base ----- 86,616,000 82,148

method of handling the above items, with the addition noted, will be accepted for the purpose of this decision will be made for routine projects. For the purpose of for the estimated year 1951 an average weighted depreciation of \$82,500,000 is adopted.

s request for increased rates is predicated, among other requested return of approximately 6.5% on an average rate for 1951 of \$86,615,564. Counsel for the City of Los Angeles return of 5.25% using a smaller rate base, while a witness on behalf of a group of cities which are served by applicant in his opinion the rate should not exceed 5.5%.

contains testimony and exhibits setting forth applicant's income, its method of financing its properties and its earnings, as well as information including trends of interest outstanding securities of other utility and industrial earnings on invested capital, and the trends of such earnings of utility companies, comparative risk data so far as the industry and the electric industry are concerned, and estimates requirements to service applicant's outstanding debt of stock and bonds. A witness called on behalf of applicant that in his opinion net income of \$5,992,241 would be provide the coverage of interest and dividends necessary on sales of preferred stock, to produce earnings of \$2.90 on common stock and, generally, to maintain applicant's income for the City of Los Angeles estimated that the company require net earnings of \$4,985,567 in order to service the securities and those proposed to be issued, including in his opinion, an assumed dividend rate of 6.5% on the common stock. A witness presented financial statements and data pertaining to money and, using an assumed capital structure including preferred stock, concluded that a return of 5.5% would enable applicant to pay a 5% dividend and to carry additional sums to surplus.

applicant's practice, in financing the cost of its properties and sell bonds and preferred stock to the public and to issue shares of common stock, at par, to General Telephone Company. At present, its capital structure consists of 54% bonds, 24% stock, and 24% equity capital. Applicant is of the opinion to reduce its debt ratio and it plans to issue, during 1951,

the latter part of the year. These issues were authorized in 1951 by Decision No. 45846 in Applications Nos. 32412 and 32413. If the applicant's program, if fully consummated, would result in a capital of approximately 50% for bonds, 24% for preferred stock and 26% for common stock.

It is evident that applicant will continue to be faced with substantial new capital expenditures into 1952.¹ These plant additions, under today's inflated costs of labor and material, require additional revenues to provide a fair return. Furthermore, the rate increases, imposed or permitted with the approval of the Board of Commissioners, must be reflected in rate increases if the utility is to maintain its rate of return.

In considering the record in this proceeding, it clearly appears that applicant will have need for additional revenues if, under present operating and tax levels, it is to enjoy a fair return on its investment. It is proposed to proceed with the financing of required extensions and additions to its properties. We are of the opinion that recognition should be made of the declining rate of return attendant upon the increased capital expenditures and investment in plant, and, after a full review of the matter with respect to applicant's operating revenues should be increased by approximately \$4,750,000 on an annual basis, which, under present wage and cost levels, in our opinion, will produce a return of 6.1% during the next five-year period, based on the projection of the average year 1951 estimates of operation. Tested against applicant's outstanding securities, and the proposed to be issued during 1951, it appears that such a revenue increase will produce net operating revenues sufficient to attract the necessary capital and to enable applicant to proceed with its construction program.

In our opinion, based upon the record in this matter, the rate increases authorized are justified and the return to applicant on its investment is fair and reasonable.

Authorized Rates

In spreading the increases in rates, we have attempted to maintain a balance as between districts and exchanges taking into consideration sizes and any peculiar conditions of the territory that may affect the cost of providing service. Rate levels and differentials as compared with service on other systems serving somewhat comparable areas have been considered. The contentions of the subscribers' representatives are also reflected in the rate levels in so far as they are consistent with the economic problems involved.

maintained in Exhibit No. 17 is incompetent and immaterial in this proceeding. However, it is evident that an indication of the earning positions of the exchanges by geographical areas is obtained from the exhibit, and the rates have been fixed in accordance with the principle that the charges for telephone service in one area should not be an undue burden on the balance of the company's cus-

tomers. In the Los Angeles extended area, the rates of return indicated in Exhibit No. 17 in the Long Beach and West Los Angeles exchanges are above average and justify rates generally below the commercial level. In the Santa Monica exchange and the remainder of the Los Angeles area exchanges, the returns were below average but not sufficient in our opinion to warrant rate differentials after reflecting the other items that make up cost of service. Under the circumstances, a reasonable solution at this time is to provide a uniform rate of return for extended service.

A comparison of the present rates for the two basic grades of extended service, namely: four-party residence service and one-party business service, with the rates proposed by applicant and those authorized by the commission herein, follows:

EXTENDED SERVICE—MONTHLY FLAT RATE—HAND SET STATION

<i>Four-Party Res. Service</i>			<i>One-Party Bus. Service</i>		
<i>Present</i>	<i>Proposed</i>	<i>Auth.</i>	<i>Present</i>	<i>Proposed</i>	<i>Auth.</i>
----- \$2.60	\$4.00	\$3.75	\$9.25	\$10.50	\$10.50
----- 2.75	4.00	3.75	9.25	10.50	10.00
----- 2.75	4.00	3.75	9.25	10.50	10.50
----- 2.60	4.00	3.75	9.25	10.50	10.50
----- 2.75	4.00	3.75	7.50	8.50	10.50
----- 2.75	4.00	3.75	7.50	8.50	10.50
----- 2.75	4.00	3.75	7.50	8.50	10.50
----- 2.60	4.00	3.75	7.50	8.50	10.50

Authorized business rates are being placed at the level proposed or higher, in order to maintain a proper balance as between the two grades of service.

Under the present plan, we are authorizing the discontinuance of local service on a uniform basis in all exchanges within the Los Angeles extended area and the Long Beach exchange. Such discontinuance will result in making available plant capacity through more efficient utilization of plant and equipment. Furthermore, improvement in service through substantial simplification in tariff schedules will result.

The extension of extended service to all subscribers in the Los An-

charges resulting from the provision of local service to customers is estimated as a net reduction of \$434,000 on an annual basis as compared to the total charges if local service were to be provided on the present basis.

Counsel for the City of Long Beach took exception to the proposal of the company to make extended service effective for all of the company's stations in Long Beach. His position was that in Long Beach only some stations are now on an extended service basis, that Long Beach is a self-contained city with only 3.9% of its calls being toll calls, that the large number of stations available the calling rate per call is as high as in the smaller communities where only a few toll calls are available, and that the geographical and economic conditions do not cause any great demand on the part of the citizens of Long Beach for extended service.

We agree with counsel's position on this subject to the extent that the proposed discontinuance of existing local service in the Long Beach exchange will not be authorized at this time.

In connection with the change from local to extended service, there will be a certain period of time during which it will be necessary to maintain local service rates in the Santa Monica, West Los Angeles, Downey, Malibu, Redondo, and Whittier exchanges. In the Santa Monica and West Los Angeles exchanges, applicant stated that the change will be made within 30 days after the effective date of this order. During the short interval of time until full extended service will be provided, the present level of local service rates will be continued. For the remainder of the exchanges, which the company is required to convert within 10 months, the local rates will be increased as authorized for the Long Beach exchange.

The company has as an objective of its long-term plan to convert the Los Angeles extended area exchanges the provision of all business service on a message rate basis. The provision of facilities for business line and private branch exchange message rate service is now being programmed for installation at the earliest feasible date in order to accomplish a more equitable distribution of charges in accordance with the cost of service. The possible discontinuance of flat rate business service is under consideration when facilities are available to provide message rate service.

A witness for the Cordingly-Sherman Apartment-Hotel stated in support of the proposal to substitute hotel message rate private branch exchange service at 5 cents per message for flat rate service. He stated that

the hotel is some \$200 per month less under the message rate than under a flat rate basis, and that the company never gave us the opinion that the rates would not have to be changed in the future. In our opinion, the proposal by the company to change hotel and house private branch exchange service in West Los Angeles from a flat to a message rate basis is sound. Under present existing economic conditions, neither a utility nor this Commission can guarantee that rate levels and classifications can remain fixed for an extended period of time. In our opinion, the message rate basis for telephone service is a more equitable way of properly allocating the cost of providing service to the small and large user. Applicant has requested authorization to withdraw the offering of foreign exchange service and substitute extended rates for the service now filed, where the serving exchange is in the Los Angeles extended area. We believe that foreign exchange service, where the serving exchange is in the Los Angeles extended area, should be furnished on an individual line extended service basis. Accordingly, the foreign exchange schedules will be authorized to be closed to new service and the company will be required to file individual line extended rates for business, residence or private branch exchange trunk service where local service is now furnished. In connection with business and private branch exchange trunk service, we are of the opinion that such service should be furnished on a message rate basis and the order will so provide. Applicant has also requested increases in foreign exchange mileage rates and the increase requested is authorized.

Since as the Commission is authorizing increases in rates for foreign exchange service, it follows that affected foreign exchange rates filed by companies should be consistent. Therefore, such connecting companies should request authority of this Commission to make the necessary changes to reflect the increases authorized in the serving exchange order herein.

It is not essential to equalize the return in each and every exchange. We have equalized as between the extended area exchanges and the outside exchanges as a group. One practical limit is applied in this leveling process is that no existing rates be increased more than 75%, except where the type of service being furnished has changed. Furthermore, consideration has been given to the relative earning position of exchanges and groups of exchanges out-

service, namely, four-party residence service and one-party service, with the rates proposed by applicant and those at the order herein, follows:

LOCAL SERVICE—MONTHLY FLAT RATE—HAND SET STATION					
<i>Exchange</i>	<i>Four-party Residential</i>			<i>One-party</i>	
	<i>Present</i>	<i>Proposed</i>	<i>Auth.</i>	<i>Present</i>	<i>Proposed</i>
Long Beach -----	\$2.25	\$None	\$3.50	\$7.50	\$10.00
San Bernardino -----	2.25	3.75	3.25	6.75	10.00
Pomona -----	2.00	3.75	3.25	6.25	10.00
Ontario -----	2.00	3.75	3.00	6.00	10.00
Laguna Beach -----	2.00	3.75	3.00	5.75	10.00
Huntington Beach --	2.00	3.75	2.75	5.25	10.00
Westminster -----	2.00	3.75	2.75	5.25	10.00
Etiwanda -----	2.00	3.75	2.50	5.00	10.00
Arrowhead -----	2.25	3.75	3.75	5.25	10.00
Crestline -----	2.25	3.75	3.75	5.25	10.00
Lancaster -----	2.25	3.75	3.75	5.25	10.00
Santa Barbara -----	2.50	3.75	3.75	7.00	10.00
Oxnard -----	2.50	3.75	3.75	6.00	10.00
Santa Maria -----	2.50	3.75	3.75	6.00	10.00
Carpinteria -----	2.50	3.75	3.25	5.50	10.00
Lompoc -----	2.50	3.75	3.25	5.50	10.00
Santa Paula -----	2.50	3.75	3.25	5.50	10.00
Santa Ynez -----	2.50	3.75	3.25	5.50	10.00
Guadalupe -----	2.50	3.75	3.00	5.25	10.00
Los Alamos -----	2.50	3.75	3.00	5.25	10.00
Thousand Oaks -----	2.50	3.75	3.00	5.25	10.00
Fowler -----	2.50	3.75	3.25	5.50	10.00
Lindsay -----	2.50	3.75	3.25	5.50	10.00
Reedley -----	2.50	3.75	3.25	5.50	10.00

A witness for the applicant testified that it is the company's intention eventually to offer, within the base rate areas, only individual party line business service and that four-party line business service is the average is not a satisfactory grade of service for a business enterprise. In exchanges within the Los Angeles extended area the company has requested that four-party business extended service be provided only to those subscribers having four-party local service. The company is of the conversion of an exchange to full extended service, and that only until facilities are available to provide a higher grade of service. We think this request is reasonable and that the grade of service will tend to provide a more satisfactory service to customers. The treatment also will be authorized in the exchanges located within the Los Angeles extended area where four-party business service is furnished.

The increases proposed in the minimum charge per month for public toll station service, in telegraph service rates, and

make such a change fully effective. In view of the fundamental principle that, if such a change, the increase will not be authorized in the absence of such a change, however, new equipment purchased by applicant should be authorized to permit the placing into effect of a rate other than the present rates, should the Commission hereafter find a change justified.

Applicant proposes to establish a new exchange, to be designated the Zuma exchange, which would include all of the present Zuma exchange, the Malibu exchange and a portion of the Oxnard exchange shown on Exhibit A, Page 9, attached to the application. It is the opinion of the Commission that facilities could be made available to establish such an exchange at this time during 1952. We are of the opinion that the removal of the Zuma district area as a part of the Los Angeles extended area is a desirable step to be taken at this time. The Zuma district is a desirable rate center so that customers in the Zuma district area are based on their location relative to all other exchanges. Since the area is sparsely developed at present, it is included in the Los Angeles area for the Santa Monica and Canoga Park exchanges, and the present service arrangements should be continued. Accordingly, the Commission's order establishing the proposed Zuma exchange is denied. The Commission is of the opinion that further consideration should be given to the introduction of extended service in the Carpinteria area with a view to providing such service on a two-way basis between the Thousand Oaks, Carpinteria, Barbara and Carpinteria. The order will provide for the applicant to submit a study covering traffic analysis, revenue, expense, and the effects of introducing such service, and to submit a similar study comparing extended service between the Thousand Oaks, Oxnard, and Malibu exchanges.

ORDER

The Southern California Telephone Company, Ltd. having applied to this Commission for an order authorizing increases in rates, public hearings having been held, and the matter having been submitted for decision,

THE COMMISSION HEREBY FOUND AS A FACT that the increases in rates authorized herein are justified and that present rates, in the absence of such a change, differ from those herein prescribed, are unjust and unreasonable.

THE COMMISSION HEREBY ORDERED that

the Commission is authorized to file in quadruplicate with this Commission

after July 21, 1951.

2. Applicant, within the exchanges herein specified, to cancel rates for local service, other than local for service, on or after July 21, 1951, but not later than June 1, 1951 in the Santa Monica and West Los Angeles and not later than June 1, 1952 in the Covina, Downey, Redondo, and Whittier exchanges.
3. Not later than April 1, 1952, applicant shall submit a traffic analysis and revenue, expense and profit introducing extended service, together with applications and recommendations thereon, between the Carpinteria and Santa Monica exchanges and between the Thousand Oaks, Oxnard and Santa Paula exchanges. These studies, after being filed with the Commission, shall be open to public inspection.

The effective date of this order shall be twenty (20) days from the date hereof.

Dated at San Francisco, California, this 29th day of

MITTELSTAEDT, HULS, MITCHELL, & COMPANY
Commissioners Craemer and Mitchell
being necessarily absent and not participating in the disposition of the matter preceding.

APPENDIX "1"

List of Appearances

Marshall K. Taylor, Donald C. Power, and O'Melveny & Meyers, for applicant; K. Charles Bean, T. M. Chubb, and Roger Arnesen, for Los Angeles, interested party; J. J. Deuel and Edson Abel, for Bureau Federation, interested party; Dewey L. Strickler, I. Joseph B. Lamb, and Henry E. Jordan, for City of Long Beach; Edward Boehm and Frank Mankiewicz, for Americans for Democracy, C.I.O., and Westwood Democratic Club, interested parties; P. City of San Bernardino, protestant; David S. Licker, for City of Santa Barbara and for Cities of Pomona, Whittier, Redondo Beach, Covina, Glendora, Oxnard, Laguna Beach, Santa Paula, Upland, Maria, Guadalupe, and Lompoc, protestants; Angelo Jacoboni, Sheehan, for Lakewood Chamber of Commerce, protestants; Montgomery and Henry T. Bailey for City of Santa Barbara, protestants; Sorenson and J. Leroy Irwin, for City of Santa Monica, interested parties; M. Busch, for Cities of Upland and Ontario, interested parties; Marion A. Smith and Robert B. Stillman for County of San Bernardino, protestant; William Reppy, for Cities of Oxnard and Port Hueneme, protestant; Donald Benton, for the County of Ventura, protestant; Richard Lompoc Farm Center, protestant; James C. Westerfelt, for Farm Bureau, protestant; Wilfred A. Rothschild, for Thousand Oaks Chamber of Commerce, protestant; Arden T. Jensen, in propria persona, and M. Paaske, in propria persona, protestant; Anthony G. G.

as presented on behalf of applicant by Edwin M. Blakeslee (history, results of operations), Marshall K. Taylor (number of employees), (operating characteristics, station data), G. Howard Briggs (estimates), Dean M. Barnes (property for future use, ratio of materials), construction program, dial operation data, toll line data), Owen (toll, and operator data), Guy T. Ellis (exchange operations, plant, pay roll segregation), Evert E. Karlsson (depreciation, maintenance), Frederick C. Rahdert (construction work in progress), Ralph K. (history, tax data), Jonathan B. Lovelace (economic and financial earnings).

as submitted on behalf of the protestants and interested parties by Frank A. Mankiewicz, T. M. Chubb, K. Charles Bean, Clarence A. E. Jordan, J. C. Westervelt, W. A. Rothschild, J. R. Henning, A. (man, R. M. Paaske, C. G. Smith, and G. A. Cordingly.

as submitted on behalf of the Commission's staff by Donald C. Neill (earnings, general expenses, taxes), Theodore Stein (balance sheet, (revenue), Marshall J. Kimball (operating revenues, expenses), Greville (use), and George W. Smith (service).

EXHIBIT A

Rates

Monthly effective rates, charges and conditions are changed only as shown in this exhibit.

Los Angeles Extended Area

EXTENDED SERVICE RATES—EACH PRIMARY STATION

	<i>Residence Flat Rate Service Monthly Rate</i>			<i>Msg. Rate*</i>	<i>Business Service Monthly Rate Flat Rate</i>		
	<i>1-Party</i>	<i>2-Party</i>	<i>4-Party</i>		<i>1-Party</i>	<i>2-Party</i>	<i>4-Party</i>
-----	\$5.50	\$4.50	\$3.75	\$--	\$10.50	\$8.25	\$--
A.-----	5.50	4.50	3.75	5.50 (80)	--	8.25	8.00
O.A.-----	5.50	4.50	3.75	--	10.50	8.25	8.00
-----	5.50	4.50	3.75	--	10.50	2.25	8.00
-----	5.50	4.50	3.75	--	10.50	8.25	--
-----	5.50	4.50	3.75	--	10.50	8.25	8.00
-----	7.00	5.55	4.50	--	12.00	9.30	8.75
R.A.-----	5.50	4.50	3.75	5.50 (80)	10.50	8.25	8.00
R.A.-----	7.50	5.90	4.75	7.50 (80)	12.50	9.65	9.00
S.-----	5.50	4.50	3.75	5.50 (80)	10.50	8.25	8.00
-----	5.50	4.50	3.75	--	10.50	8.25	8.00

LOCAL SERVICE RATES—EACH PRIMARY STATION

	<i>Residence Flat Rate Service Monthly Rate</i>				<i>Business Flat Rate Service Monthly Rate</i>		
	<i>1-Party</i>	<i>2-Party</i>	<i>4-Party</i>		<i>1-Party</i>	<i>2-Party</i>	<i>4-Party</i>
-----	\$5.25	\$4.25	\$3.50		\$8.50	\$7.00	\$--
-----	5.25	--	3.50		8.50	7.00	6.75
-----	5.25	--	3.50		8.50	7.00	--
-----	5.25	--	3.50		8.50	7.00	--
-----	5.25	4.25	3.50		8.50	7.00	6.75
-----	6.75	5.30	4.25		10.00	8.05	7.50
-----	5.25	--	3.50		8.50	7.00	6.75

MONTHLY RATE—EACH PRIMARY STATION

<i>Exchange</i>	<i>Suburban Line</i>			
	<i>Local</i>		<i>Extended</i>	
	<i>Residence</i>	<i>Business</i>	<i>Residence</i>	<i>Business</i>
Covina -----	\$3.75	\$6.00	\$4.25	\$7.25
Downey -----	---	6.00 ^a	---	---
Long Beach -----	3.75	6.00	7.25	7.25
Malibu -----	3.75	6.00	7.25	7.25
Redondo ^b -----	3.75	6.00	7.25	7.25
Santa Monica ^c -----	3.25	5.00	7.25	7.25
Whittier -----	3.75	6.00	7.25	7.25

* Applicable to service furnished under Schedule No. A-1 (a).

^a Applicable only to services furnished on a deviation basis.

^b Suburban area and special rate area.

^c Furnished only within the Topanga Canyon area.

EXTENDED SEMIPUBLIC COIN BOX SERVICE

<i>Exchange</i>	<i>Ind Minimum Per D</i>
Santa Monica—Special Rate Area-----	\$0.25

Service in Santa Barbara and Ventura County Exchanges

EACH PRIMARY STATION

<i>Group</i>	<i>Residence Flat Rate Service Monthly Rate</i>				<i>B R M</i>
	<i>1-Party</i>	<i>2-Party *</i>	<i>4-Party</i>	<i>1 Party</i>	
A -----	\$4.50	\$3.50	\$3.00	\$6.25	
B -----	5.00	4.00	3.25	6.75	
C -----	5.50	4.50	3.75	7.50	

Special Rate Areas

Oxnard (Camarillo) -----	7.50	---	4.75	9.50
Santa Maria (Orcutt) ----	7.50	---	4.75	9.50

*Suburban Line
Monthly Rate*

<i>Group</i>	<i>Residence</i>	<i>Business</i>	<i>P</i>
A -----	\$3.50	\$4.50	
B -----	3.75	4.75	
C -----	4.25	5.25	

* Not offered in Los Alamos, Santa Ynez and Thousand Oaks.

^a Applicable only in Thousand Oaks.

^b Applicable only in Oxnard-Hueneme base rate area.

^c Also authorized for farmer line service in Gaviota and Las Cruces.

RATE GROUPING

<i>Exchange</i>	<i>Group</i>	<i>Exchange</i>
Carpinteria -----	B	Santa Barbara -----
Guadalupe -----	A	Santa Maria -----
Lompoc -----	B	Santa Paula -----
Los Alamos -----	A	Santa Ynez -----
Oxnard -----	C	Thousand Oaks -----

EACH PRIMARY STATION

	<i>Residence Flat Rate Service Monthly Rate</i>			<i>Business Flat Rate Service Monthly Rate</i>	
	<i>1-Party</i>	<i>2-Party</i>	<i>4-Party</i>	<i>1-Party</i>	<i>2-Party</i>
y, Reedley-----	\$5.00	\$4.00	\$3.25	\$6.75	\$5.50
more S. R. A.)-----	7.00	--	4.25	8.75	6.90
	<i>Suburban Line Monthly Rate</i>		<i>Farmer Line Minimum Charge</i>		
	<i>Residence</i>	<i>Business</i>	<i>Per Line</i>	<i>Per Month</i>	
y, Reedley-----	\$3.75	\$4.75		\$6.75 ^a	
more S. R. A.)-----	3.75	4.75		6.75	

Rate Area
Fowler.

Angeles, Orange and San Bernardino County Exchanges

EACH PRIMARY STATION

	<i>Residence Flat Rate Service Monthly Rate</i>			<i>Business Flat Rate Service Monthly Rate</i>		
	<i>1-Party</i>	<i>2-Party</i>	<i>4-Party</i>	<i>1-Party</i>	<i>2-Party</i>	<i>4-Party</i>
-----	\$4.00 *	--	\$2.50 *	\$5.50 *	\$4.50 *	\$4.25 *
-----	4.25	--	2.75	6.00	4.75	4.50
-----	5.50	\$4.50 ^a	3.75	8.50	6.50	6.25
-----	4.50	3.50 ^b	3.00	6.50	5.25	--
-----	4.75	--	3.25	7.00	5.50	5.25 ^c
	<i>Suburban Line Monthly Rate</i>		<i>Farmer Line Minimum Charge</i>			
	<i>Residence</i>	<i>Business</i>	<i>Per Line</i>	<i>Per Month</i>		
-----	\$3.00 ^d	\$4.25 ^d		\$8.00 ^e		
-----	3.25	4.50		--		
-----	4.00	5.00		8.50 ^f		
-----	3.50	4.50		6.50 ^b		
-----	3.50	4.75		13.50 ^c		

-----suburban residence, \$3.75; suburban business, \$5.00.
only.

RATE GROUPING

<i>Group</i>	<i>Exchange</i>	<i>Group</i>
----- C	Lancaster -----	C
----- C	Ontario -----	D
----- A	Pomona -----	E
ach ----- B	San Bernardino -----	E
----- D	Westminster -----	B
----- A		

changes Outside of the Los Angeles Extended Area

al condition, Schedule No. A-1, Individual and Party Line Service,

and conditions set forth in this schedule for business four-party line
company's exchanges outside of the Los Angeles extended area apply

Offered

FLAT RATE SERVICE—BASE RATE AREAS

Each trunk line: 150% of the individual line primary hand rounded to the lower 25-cent multiple except in special rate areas.

FLAT RATE SERVICE—SPECIAL RATE AREAS

Each trunk line: Rate in base rate area plus the difference for business individual line flat rate service in the base rate area and such service in the special rate area.

MESSAGE RATE SERVICE—DOWNEY, TOPAZ DISTRICT AREA

Rate

First two trunks-----

Each additional trunk-----

**Schedule No. A-7, Hotel Private Branch Exchange Service
Santa Monica, West Los Angeles**

EXTENDED SERVICE TRUNK RATE—MESSAGE RATE SERVICE

Rate

First two trunks-----

Each additional trunk-----

MESSAGE RATE

Each exchange message-----

Cancel rates for hotel private branch exchange flat rate extended in the West Los Angeles exchange.

**Schedule No. A-15, Supplemental Equipment All Exchanges
Except Gaviota and Las Cruces**

SERVICE MONITORING EQUIPMENT

Rearranging or changing connection of service monitoring equipment to subscribers' lines:

One line-----

Two to 10 lines changed at the same time-----

Cancel rates set forth in Rate Section B. Cancel Special Conditions

Schedule No. A-16, Multi-Residence Service—Redondo, Santa Monica

Rates for Multi-Residence Service are authorized to be cancelled

Schedule No. A-18, Vacation Rate Service

Revise Special Condition 5 to read:

No incoming or outgoing service will be furnished during the vacation period. The telephone numbers and facilities will remain available for restoration at the end of the vacation period.

Add special condition to read:

Vacation rate service will not be furnished in connection with foreign service.

Schedule No. A-19, Foreign Exchange Service All Listed Routes

Primary rates for foreign exchange local and extended service are to be made effective at a level consistent with the basic individual line, PBX trunk rates effective in the foreign exchange as of July 21, 1951, per month for business service and the first PBX trunk and 25 cents for residence service.

Add special condition to read:

The above rates for foreign exchange service comprehend a primary distribution in the directories having primary distribution in the local and foreign exchange

foreign exchange is outside the Los Angeles extended area.

condition to read:

and conditions set forth in this schedule for residence two-party, four-rban local foreign exchange service beyond the first one-half mile to services established or applied for prior to July 21, 1951, furnished subscriber, either on the same premises or as moved to a different address within the same local exchange. Additions to the service and service are permitted under this condition.

foreign exchange is within the Los Angeles extended area:

for extended foreign exchange individual line and PBX trunk service offering of such service over routes where service is being furnished under the local foreign exchange tariffs as of July 21, 1951. For business rates, the basic rates from which the extended foreign exchange rates are as follows:

<i>or District Area</i>	<i>Business Individual Line Message Rate</i>
-----	\$5.50 (80)
Correy District Area -----	5.50 (80)
h -----	5.50 (80)
-----	5.50 (80)

number following a rate designates the message allowance under the rate quoted. The message over the allowance is 5 cents.

condition to read:

and conditions set forth in this schedule for local foreign exchange y to services established or applied for prior to July 21, 1951, furnished subscriber, either on the same premises or as moved to a different address within the same local exchange. Additions to the service and service are permitted under this condition.

FOREIGN EXCHANGE MILEAGE RATES

mileage rates as set forth on Exhibit E attached to the first amended e 14, are authorized.

ence two-party foreign exchange mileage rate of \$1.75 for each one-fraction thereof for service over listed routes between contiguous

-24, Receiving Cabinet Service

anges Except Gaviota; Lake Hughes and Las Cruces

rates set forth in Exhibit E, attached to the first amended application, thORIZED.

-2, Toll Station Service

rates set forth in Exhibit E, attached to the first amended application, thORIZED.

-1, Telegraph Service

rates set forth in Exhibit E, attached to the first amended application, thORIZED.

4-1, Message Unit Service

rate of 5 cents per message unit in connection with Hotel PBX service Angeles exchange is authorized.

03 (June 29, 1951). Niels Schultz (Millbrae Highlands Water Com- thORIZED to issue a promissory note.

09 (June 29, 1951). Acme Transportation, Inc., authorized to execute additional sales contracts.

- D 45895, A 32407 (June 29, 1951). Southwest Gas Corporation, Ltd issue \$400,000, par value, of its First Mortgage Bonds, 4% Series 1448 shares of common stock.
-
- D 45896, A 32452 (June 29, 1951). Felton Water Company authorized 16.3 acres of nonoperative property to the estate of George deceased.
-
- D 45897, A 32402 (June 29, 1951). Amends route 8, subparagraph paragraph 2 of D 45840 Eastern Cities Transit, Inc., and extends order. (1st Supp. Order).
-
- D 45898, C 5308 (June 29, 1951). *Ione West v. Pacific Telephone Company*. Interim restoration of service pending hearing.
-
- D 45899, A 32498 (June 29, 1951). Louis M. Goodman (Goodman Delivery and Goodman Delivery Service, Inc., authorized to transfer his carrier and express operative rights to 20th Century Delivery).
-
- D 45900, A 32493 (June 29, 1951). Pine Flat Water Company authorized 400 shares of \$10 par value common stock.
-
- D 45901, A 32080 (June 29, 1951). Willig Freight Lines allowed an extension of time on D 45350, a securities order. (1st Supp. Order).
-
- A 45902, A 32079 (June 29, 1951). E. J. Willig Truck Transport allowed an extension of time on D 45351, a securities order. (1st Supp. Order).
-
- D 45903, A 31825 (June 29, 1951). John F. Neher and Mae Neher (Telephone Company) allowed an extension of time on D 44900 Order).
-
- D 45904, A 32527 (June 29, 1951). Western Pacific Railroad Company authorized to construct tracks at grade across Indiana and Tennessee Streets in San Francisco.
-
- D 45905, A 32499 (June 29, 1951). Southern Pacific Company authorized to construct a drill track at grade across LaFayette Street, Santa Clara County.
-
- D 45906, A 32470 (June 29, 1951). City of Bakersfield authorized to construct a street at grade across a Southern Pacific Company track at Virginia Avenue at grade across a Southern Pacific Company track.
-
- D 45907, A 32464 (June 29, 1951). City of Bakersfield authorized to construct a street at grade across a Southern Pacific Company track.
-
- D 45908 A 32440 (June 29, 1951). Southern Pacific Company authorized to construct its non-agency station at Cuneo, Kings County.
-
- D 45909, C 5297 (June 29, 1951). *John Ferro v. San Joaquin County*. Defendant ordered to substitute one of complainant's parcels of land in its service area.
-
- D 45910, A 32457 (June 29, 1951). Pacific Gas and Electric Company authorized to carry out the terms of an electric contract with Superior Concrete Company, Inc.
-
- D 45911, A 32182 (June 29, 1951). Beninger Transportation Service authorized an in lieu certificate of public convenience and necessity as a street service between East Richmond Heights and Richmond extending over 35 but less than 40 feet in length between San Francisco and Richmond.
-
- D 45912, A 31161 (June 29, 1951). Pacific Greyhound Lines authorized to construct a street over 35 but less than 40 feet in length between San Francisco and Richmond.

Electric Power Company authorized to charge United States for power purchased in California and transported by the latter to its Naval Ammunition Depot at Lake Mead, Nevada, the rates prescribed for such service by Decision No. 41798 and authorized and directed to charge Mineral County Power System for power purchased in California and transported by the latter to Nevada for resale, the rates prescribed for such service by said Decision No. 41798.

UTILITIES—INTERSTATE COMMERCE—COMMISSION—GENERAL JURISDICTION AND POWERS. Where the Navy pursuant to contract purchases electric power from California from an electric utility, which energy is derived both from licensed and non-licensed projects in California and is consumed by the Navy at a Naval reservation in Nevada by the Navy and its naval and civilian personnel, there is nothing either in the interstate commerce clause of the Constitution or in the Federal Power Act to preclude the jurisdiction of the California Commission.

UTILITIES—COMMISSION—JURISDICTIONAL LIMITATIONS—INTERSTATE COMMERCE. A state cannot regulate the rates charged by a local electric utility when sold to a foreign electric utility for resale in another state and when sold at the state boundary, inasmuch as the interstate business carried on by the two utilities is essentially national in character, and state regulation would constitute a direct burden upon interstate commerce, placing a direct burden on that which, in the absence of federal regulation, should be free. *U.C. v. Attleboro Steam and Electric Co.* (1927), 273 U. S. 83, 71 S. Ct. 101.

UTILITIES—INTERSTATE COMMERCE—COMMISSION—GENERAL JURISDICTION AND POWERS. Even if it be assumed that the sales by California Electric Power Company to the Navy are in interstate commerce, regulation by the State of California for such sales does not fall within the proscription of the *Attleboro* decision. Only one state, viz., California, is directly concerned, since no state has jurisdiction over the Navy, an arm of the federal government. Thus, absent that potential clash of respective state interests which underlay the *Attleboro* decision. Perhaps an even more conclusive circumstance for the proposition that the interstate commerce clause does not prohibit California jurisdiction is the fact that electric rates prescribed by the California Commission are not the rates which a utility must charge on armaments of the United States Government. General Order No. 96 provides that an electric utility furnish electric service "at free or reduced rates or under conditions otherwise departing from its filed tariff schedules to the United States Government departments." Thus, the federal government is in no way burdened in its negotiations with an electric utility by a California rate order.

UTILITIES—INTERSTATE COMMERCE—COMMISSION—GENERAL JURISDICTION AND POWERS. Congress has conferred jurisdiction on the Federal Power Commission under Section 20 of the Federal Power Act only if any state directly concerned has not provided a commission or other authority to regulate the requirements of Section 20 within such state ("requirements" meaning referring to the provision that the rates and services by licensees for power purchased from licensees for resale in public service shall be reasonable and furthermore, even though the requisite state commissions or other authorities have been provided, only if the states directly concerned are unable to regulate the services or rates through their properly constituted authorities. The California Commission is the kind of state "commission or other authority" contemplated by Section 20, for it has comprehensive power to regulate electric power and service "within such state," viz., California. California is the state which can, because of its authority over California Electric, affect the rates to the Navy. Since only one state is "directly concerned," no question of inability as between two states directly concerned to agree on the

of electric energy to any person for resale."

- [6] **ELECTRIC UTILITIES—INTERSTATE COMMERCE—COMMISSION—JURISDICTION AND POWERS.** Jurisdiction is denied the Federal Power Commission over sales of electric energy for use by the Navy in Nevada by the provisions of Sections 201(a) and 201(b) of Part II of the Federal Power Act. Section 201(a) declares that federal regulation shall "extend only to sales of electric energy which are not subject to regulation by the States" and Section 201(b) of Part II applicable to "sales at wholesale in interstate commerce." The Commission intended the Federal Power Commission to have jurisdiction over sales of electric energy where the United States Supreme Court had declared state regulation could not be exercised because of the interstate commerce clause.
- [7] **ELECTRIC UTILITIES—INTERSTATE COMMERCE—COMMISSION—JURISDICTION AND POWERS.** The machinery set up in Section 20 of the Federal Power Act, which allows state jurisdiction under certain conditions when applied to sales of electric energy to Mineral County Power System for resale in Nevada, enables the California Commission to exercise jurisdiction without interfering with the rights of Nevada and without imposing an undue burden on interstate commerce. Part II does not apply because the California Commission is not a "person" as defined. Even if construed to apply, the proviso clauses alluded to in Sections 201(a) and 201(b) of Part II operate to preserve the exercise of jurisdiction recognized by the Commission.
- [8] **ELECTRIC UTILITIES—INTERSTATE COMMERCE—COMMISSION—JURISDICTION AND POWERS.** In the case of the sales to Mineral County Power System (1) each of the states directly concerned, viz., California and Nevada, has provided "a commission or other authority to enforce the requirements of the section [Section 20 of Part I of the Federal Power Act] with respect to such sales and (2) such states have not, through their properly constituted authorities, been shown unable to agree on the rates for the sales in question. Under said Section 20, jurisdiction over the sales rests in the Commission.

Henry W. Coil, for applicant, California Electric Power Company ;
and *L. B. B. Lindstrom*, for Mineral County Power System
Hamilton Treadway, and *F. W. Denniston*, for the United States
H. Lakusta, for the Commission's staff.

OPINION

California Electric Power Company, by its first and supplemental applications in this proceeding, seeks determination of the Commission's Decision No. 41798 of July 1, 1948, authorizing rate increases, applies, respectively, to sales to the Navy of the Government's Naval Ammunition Depot, Hawthorne, and to sales to Mineral County Power System for resale in Nevada. Applicant requests that such determinations be made affirmative, thus making the utility's Schedule P-2 applicable to sales to the Navy and its Schedule P-3 applicable to the sales to Mineral County Power System. Should the Commission construe the decision not to apply, applicant seeks the establishment of appropriate rates for such sales.

Both supplemental applications refer to the matter of the Commission's Decision No. 41798 and the position is taken that jurisdiction lies in the California

rates, are reasonable. A further hearing was scheduled on the calendar when the Federal Power Commission evinced, in correspondence, a desire to explore the question of jurisdiction. In recognition thereof, on February 15, 1950, it issued an order to the California Electric Power Company. On March 20, 1950, pursuant to mutual agreement between that Commission and the company, a concurrent hearing was held which, in so far as this Commission was concerned, bore solely upon the jurisdictional question. It was explained to Commissioner Rowell that, if additional evidence should become available at a later date, due notice would be given.

It should be stated at the outset that the Commission is now satisfied with its careful weighing of the record, that no further evidence is necessary or satisfactory to dispose of the issues raised by the two supplementary petitions. Accordingly, the order herein will include sub-

California Electric Power Company Operations.

The California Electric Power Company renders public utility electric service in southeastern California in parts of Mono, Inyo, Kern, San Bernardino, Riverside, and Imperial counties. Its Nevada Division serves Elko and Esmeralda counties, Nevada. Fifty-five per cent of all electricity supplied by the company comes from its own generating plants. The other forty-five per cent is obtained from Southern California Edison Company, the Department of Water and Power of the City of Los Angeles, and neighboring electric production agencies with which California Electric maintains interconnections.

In 1950, California Electric served an average of about 56,000 customers, 60 per cent of whom were in California. Residential and commercial customers purchased 11 per cent, rural customers, 15 per cent, industrial and commercial customers, 61 per cent, and other customers, 13 per cent of California Electric's energy sales.

The company's production sources are interconnected with a network of high-voltage lines extending southerly from Mono County to about 300 miles along the easterly slope of the Sierra Nevada mountains, also extending throughout its main system around Mono and Riverside, and easterly from Victorville some 200 miles to the Fort Dam Power Plant. In 1950, the maximum system demand was 1,200 megawatts.

The company also serves the Mineral County Power System, with a demand of about 100 megawatts.

half the distance being in California and the other half in Nevada. During periods of emergency trouble, these customers have arranged to use the more reliable Navy line jointly. California Electric adjusted its rates to conform to the disposition of deliveries upon advice of its customers. Mineral County Power System resells the energy it purchases from its retail customers in Nevada. The Navy uses its deliveries of power generated by its own fuel generating plant, for the power requirements of its industrial activities and for the recreational needs of employees or personnel housed at the reservation.

Construction of Decision No. 41798.

In Application No. 28791, California Electric sought an increase in rates. It proposed increases in all of its filed tariffs except in a number of special contract rates. It did not request an increase in the rates contained in the then effective special contract rates applicable to sales to the Navy and to Mineral County Power System.

For the rate proceeding, studies of the trend and pattern of applicant's revenues and expenses were made by applicant, by interested parties, and by engineers of this Commission's staff. It can be seen from the exhibits in the proceeding, from the analysis of applicant to this Commission, and from the testimony of the Chief Engineer of this Commission, the revenues and expenses of applicant with the sales to the Navy and Mineral County Power System were included in the statistics upon which the earning studies were made. In Decision No. 41798, the Commission concluded that applicant was entitled to an increase in rates. In prescribing rates, it spread the increase equitably among the several classes of rates in accordance with accepted practice. The Commission indicated its satisfaction with special rate contracts and directed applicant to continue a substantial number of special rates. It prescribed S-1 and P-3 for customers of the same type and kind as those of Mineral County Power System, respectively. It made the rates applicable to all similar customers on the California system except the City of San Bernardino. It further satisfied itself that the cost of deliveries to the Nevada system was at a level substantially in line with the wholesale power schedule. By establishing such rates, the Commission was satisfied that each customer would be required to pay no more than was necessary and that no customer would obtain an undue share of the benefits of the new rates.

a contract dated October 5, 1945, which specified a term of . . . The rates applicable to the Navy were set forth in a contract . . . for the period July 1, 1943, to June 30, 1944, and thereafter 30 days' written notice by either party.

As prescribed by Decision No. 41798 became effective August 1, 1948, a letter dated July 30, 1948, California Electric notified the Commission of the termination of the July 1, 1943, contract, to be effective August 1, 1948. The contract with Mineral County Power System by which rates expired on October 4, 1948. Since no new contract rates had been filed for either the Navy or Mineral County Power System, the rates of P-2 and P-3, respectively, became applicable on October 1, 1948, respectively, unless Decision No. 41798 should be held inapplicable to apply.

Decision No. 41798 does apply, as we construe it, to the sales to the Navy and Mineral County Power System. It is true that the decision is directed specifically to such sales, but there can be no doubt from the extensive language and general tenor, to say nothing of the purpose on which it is based, that it was intended to cover all sales to California Electric. The decision states:

"As previously noted, a number of applicant's deliveries to large customers are made under special contract agreements at rates other than those contained in the filed tariffs. Under the request contained in the application, the Commission is asked to authorize applicant to make effective certain changes in special contracts. Several of the existing contracts under their present terms and conditions provide for the expiration of any newly effective tariffs authorized. The remaining contracts providing for deliveries at special rates either have expired, or, within the next twelve months, will expire or may be terminated by applicant. Under these circumstances it appears unnecessary for the Commission to order at this time the termination or extensive modification of any existing special contracts."

Decision No. 41798 further states:

"The tariffs herein authorized are intended for application to all sales by applicant to customers in California, excepting only sales to other distributing agencies with whom applicant has long-term purchase agreements. . . . In any one area a single rate will apply to service to domestic customers; . . . a large block power rate will provide for the major industrial and commercial deliveries; and a resale power rate will apply to deliveries for resale purposes."

It is stated in the decision that the conditions surrounding the utility's

to the Navy and Mineral County Power System, we turn to of jurisdiction.

Jurisdiction.

The question is presented whether California is precluded from exercising jurisdiction over the sales to the Navy and Mineral County Power System, either by virtue of the interstate commerce clause, or by its own force, or by enactment of the Federal Power Act (49 Stats. 841, 16 USCA Sec. 791, et seq.). In arriving at the conclusion that that jurisdiction is not precluded, we have been substantially aided by the several briefs filed in connection with the concurrent proceedings. We are not unmindful that the Federal Power Commission, in its Report No. 212 issued on April 13, 1951, asserted jurisdiction, in which Mr. Smith dissented. It may be noted that the Federal Examining Board has issued an opinion stating that the Federal Power Commission has no jurisdiction. Rehearing was denied on June 6, 1951.

We will consider separately the sales to the two customers.

Sales to the Navy.

[1] The service to the Navy was begun, as indicated above, pursuant to a contract for the sale of all energy required by the Government "for use of the Government's Naval Ammunition Division at Tonopah, Nevada, except such electric energy as may be generated by the Government on said premises." The energy purchased by the Navy is consumed wholly on the Naval reservation which, in addition to the installations devoted directly to Naval use, includes the homes of Naval personnel described as "public quarters" and the "Babbitt Cost Housing Project" known as Babbitt, which provides living quarters and facilities for those civilians connected directly or indirectly with the Navy's activities on the reservation.

The evidence indicates that, while a large percentage of the energy furnished to the Navy is derived from licensed projects, the same is not when all or a portion of it comes from non-licensed sources.

As stated above, the energy is delivered by California Electric Company to the Navy at Mill Creek and transmitted by the Navy over its lines in Nevada for consumption.

It is our opinion that upon such facts there is nothing in the interstate commerce clause of the Federal Constitution or in the Federal Power Act to preclude our jurisdiction.

] that a state cannot regulate the rates charged by a local utility for current sold to a foreign electric utility for resale in and delivered at the state boundary, inasmuch as the interests carried on between the two utilities is essentially national and state regulation would constitute a direct burden upon commerce, placing a direct restraint on that which, in the federal regulation, should be free.

Even if it be assumed that the sales by California Electric to be in interstate commerce, regulation by the State of California for such sales does not fall within the proscription of the decision. Only one state, viz., California, is directly concerned. No state can have jurisdiction over the Navy, an arm of the government. Nevada has no jurisdiction over the rates the Navy charges California Electric, nor over the rates the Navy charges its tenants. California's jurisdiction arises solely from its power over California Electric. Thus, there is absent that potential conflicting state interests which underlay the conclusion in the *Attila* decision.

It is an even more conclusive circumstance for the proposition that the interstate commerce clause does not preclude California jurisdiction over the fact that electric rates prescribed by our Commission are rates which a utility must charge an arm of the United States government. The Commission in 1942 issued General Order No. 96, which provides in Section X-B, that an electric utility may furnish service "at free or reduced rates or under conditions otherwise specified in its filed tariff schedules to the United States and to its possessions." (See Public Utilities Act, Section 17.) Thus, while the difference between charges under filed tariffs which have been found reasonable and the revenue actually received for service supplied to the government, would have to be borne by California Electric rather than its customers, the federal government is in no way burdened in its relations with the utility by a California rate order.

It follows that since a sister state is not deprived of anything to which it is entitled and the federal government is in no way burdened, the exercise of California jurisdiction, such jurisdiction does not constitute an undue burden upon interstate commerce and, therefore, does not violate the interstate commerce clause of the Federal Constitution. It should be noted in passing that the situation here presented is quite different from the *Attila* decision not only for the reasons

electricity are in furtherance of its national defense obligation, its undertaking to provide electric service to its personnel and the fact that Hawthorne is merely incidental thereto.

Not only do we conclude that the interstate commerce clause presents no barrier to the exercise of our jurisdiction over the Navy, but we find nothing in the Federal Power Act taking jurisdiction away. Such conclusion is reached even if it is a Part I of the Act (setting forth the provisions applicable to power from licensed projects is involved) and Part II (applying "to the sale of electric energy at wholesale in interstate commerce but . . . to any other sale") both apply or that either Part I or Part II apply. *Safe Harbor Water Power Corp. v. FPC* (CCA 3d, 1941), 120 F.2d 848, cert. dnd. (1942), 316 U.S. 663, 86 L. ed. 1740; *Safe Harbor Water Power Corp. v. FPC* (CA, 3d, 1949), 179 F.2d 179, cert. dnd. (1950), 957, 94 L. ed. 1368.

Turning first to Part I (derived from the Federal Water Power Act of 1920, ch. 285, 41 Stat. 1063), if it be assumed that the Navy are in interstate commerce, the applicable language of Section 20 providing, in so far as pertinent, that when:

"said power or any part thereof [presumably any power sold by a licensee] shall enter into interstate or foreign commerce at rates . . . and the services . . . by any . . . licensee or by any person, corporation, or association purchasing power from a licensee for sale and distribution or use in public service, the rates shall be reasonable . . . to the customer . . .; and whenever a state directly concerned has not provided a commission or other authority to enforce the requirements of this section within such state . . . or such states are unable to agree through their constituted authorities on the services . . . or . . . rates, jurisdiction is hereby conferred upon the [Federal] Commission to regulate . . . so much of the services . . . and . . . rates therefor as constitute interstate or foreign commerce

[4] It will be observed that Congress has conferred jurisdiction upon the Federal Power Commission under Section 20 only if a state directly concerned has not provided a commission or other authority to enforce the requirements of Section 20 within such state. The phrase "such state" apparently referring to the provision that the rates charged by licensees or persons purchasing from licensees for resale of electric service shall be reasonable), and furthermore, even though a state commission or other authorities have been provided

of state "commission or other authority" contemplated for it has comprehensive power to regulate electric utility "within such state," viz., California. We have already in considering the interstate commerce clause, that California state which can, because of its authority over California the sales to the Navy. Nevada cannot order the Navy to rate for electricity purchased, nor can it order the Navy to obtain rate for electricity distributed. It follows that, since it is "directly concerned," no question can arise of inability of states directly concerned to agree on the reasonableness charged to the Navy. Thus, Federal Power Commission is excluded because the two conditions to its exercise, as pre-empted in Section 20, are absent.

to Part II of the Federal Power Act (enacted as part of the Public Utility Act of 1935, ch. 687, 49 Stat. 803), it is declared in Section 20 that:

"The provisions of this Part shall apply . . . to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy . . ."

In this jurisdictional language, it is provided in the policy of Section 201(a) that federal regulation of the "sale of such electric energy at wholesale in interstate commerce is necessary in the public interest, such federal regulation, however, to extend only to those sales which are not subject to regulation by the states."

Aside the question whether the sales are in interstate commerce, it is clear that [5] the sales to Navy do not fall within the language "sale of electric energy at wholesale," which is defined by Section 201(d) as "sale of electric energy to any person for resale." The sales to the Navy are neither sales to a "person" nor are they sales "for

resale." "person" is defined by Section 3(4) of the Act to mean "any individual or corporation." A "corporation" by Section 3(3):

"any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees, of any kind or character, including any municipal corporation, or any agency or instrumentality thereof. It shall not include 'municipalities' . . ."

It is clear that the Navy is not a "person" as defined.

Is the Navy not a "person" but the sales to it cannot properly be treated as "sales for resale." We have already alluded to the

language. All of the energy is consumed on the Naval reservation is used in the Depot's industrial operations or dissipated as losses; the balance is used by the individuals and business located on the government reservation. Individuals may conduct business only so long as their presence is consistent with their obligations. The lease agreements with those occupying the "low-cost housing projects" and with those occupying the low-cost housing projects at Babbitt, both provide that the rental privilege ceases upon termination of employment. For the business concessions, the government has issued a "Revocable Permit" reciting that the concession is "for the use of employees of the Depot."

It follows that the sales to the Navy are in effect for resale. It is true that, in supplying electricity to those living on the reservation and conducting business at the reservation, the Navy is in a sense "reselling" electricity purchased from California Electric Power Company, but the term "sale for resale" in Part II of the Federal Power Act was intended to refer to a very different situation. The Supreme Court has repeatedly pointed out that Part II was enacted to close the loophole in utility regulation revealed by the *Attleboro* decision. See *Central Power & Light Co. v. FPC* (1943), 319 U.S. 61, 80 S. Ct. 953. The Navy is certainly not a public utility. Even if it would not be precluded from that status by virtue of its being owned by the federal government, it could not be deemed a public utility because of furnishing electricity to tenants whose continued tenancy is dependent upon the needs of the Navy landlord.

We are satisfied, in the light of the foregoing observations, that the sales to the Navy are not to a "person for resale" within the meaning of the Federal Power Act, but quite aside from that question, since federal jurisdiction is denied the Federal Power Commission by the provisions of Sections 201(a) and 201(b) of Part II. Section 201(a) declares that federal regulation shall "extend only to those sales of electric energy which are not subject to regulation by the States" and Section 201(b) making Part II applicable to "sales at wholesale in interstate commerce", contains the proviso that Part II "shall not apply to the sale of electric energy." Taking these sections together and considering them in the light of their statutory history, it is plain that Congress intended the Federal Power Commission to have jurisdiction over that area where the United States Supreme Court had held that federal regulation over sales could not be exercised because of

machinery set up by Congress in Section 20 of Part I to upon certain conditions to exercise jurisdiction without interstate commerce is available upon the facts shown and is available for California to regulate the sales to the Navy. Thus, the Constitution and Part I of the Federal Power Act, may exercise jurisdiction. Therefore, the provisos of Section 20 and 201(b) in Part II operate to deny Federal Power jurisdiction under Part II. It follows that there is nothing to prevent the exercise of California jurisdiction over the sales to the Navy, and we so conclude.

Mineral County Power System.

As previously noted, California Electric sells electric energy to Mineral County Power System at Mill Creek, and the latter transmits it over its own line to Nevada, reselling to local consumers in Nevada. In the case of the Navy, the evidence indicates that, while the advantage of the energy is derived from licensed projects, there is even though all or a portion of it comes from nonlicensed sources.

The propositions set forth above in support of our conclusion that the State may properly exercise jurisdiction over the sales to the Navy with equal force to the sales to Mineral County Power System. However, there are certain differences which will be pointed out hereafter. This is which follows.

It is stated that independently of any consideration of federal interstate commerce clause does not operate to prevent California from exercising jurisdiction over the sales to the Navy inasmuch as no clash between state interests can be involved and inasmuch as the federal government is not burdened by the exercise of California jurisdiction. A different situation exists with the sales to Mineral County Power System, for the State of Nevada clearly has an interest in the sales to Mineral County Power System and the rates in Nevada paid by it to its customers. [7] Turning to the Federal Power Act, we are satisfied that the machinery set up in Section 20 of Part I which allows state jurisdiction under certain conditions, when the facts in issue enables this Commission to exercise jurisdiction without interfering with the rights of Nevada and without imposing undue burden on interstate commerce. We are further satisfied that Part II does not apply because the sales to Mineral County Power System are not to a "person" as defined. We are further satisfied

ditions must, by the terms of Section 20, be present before the concerned may exercise jurisdiction: (1) they must have with authority to enforce the requirements of Section 2 state; (2) such states must not be unable to agree upon the charged. [8] In the case of the sales to Mineral County Power (1) each of the states directly concerned, viz., California has provided "a commission or other authority to enforce the requirements of this section within such state," and (2) such states through their properly constituted authorities, been shown to agree on the rates for the sales in question.

Considering the first of these propositions, it cannot be contended that the California Commission, entrusted as it is with broad regulatory authority over the rates and service of utilities in the state, fails to qualify as "a commission or other authority to enforce the requirements of this section within such state." While the Nevada Public Service Commission does not exercise as great a degree of control over the Mineral County Power System as it does over public utilities organizations engaged in public service in Nevada, it nevertheless exercises jurisdiction over Mineral County Power System's rates. Nevada Public Service Commissions of 1925 provide at page 55:

"Sec. 16. The maintenance and operation of said Mineral County Power System shall be under the control, supervision and management of the board of managers, and rates charged to consumers for the transmission and distribution of electric energy and current, and for telephone service, with the terms and conditions thereof, shall be fixed by said board, *subject to the supervision of the Nevada Public Service Commission, who may revise, raise or lower the same.*" (Emphasis added.)

The quotation makes clear that the Nevada Public Service Commission is, with respect to Mineral County Power System's rates, a "commission or other authority to enforce the requirements of this section within such state."

The Federal Power Commission, adopting the contentions of the Nevada Public Service Commission's legal counsel, has declared in its Opinion No. 212, above referred to, that the Nevada Public Service Commission, in order to qualify as "a commission or other authority to enforce the requirements of this section within such state," a commission or other authority not only to regulate the rates charged by a utility for rates such utility pays for power purchased outside the state for transmission in interstate commerce. It is claimed that the Nevada Public Service Commission does not qualify because it is not empowered to fix the

commissions with powers beyond those normally entrusted
vers which might indeed be found to be unconstitutional.
to the second proposition, there was no evidence whatever
that California and Nevada "through their properly con-
corities" were "unable to agree." No evidence whatever was
cting any course of dealing, or an absence thereof, between
a and Nevada commissions, or between any other authorities
etive states. The Chairman of the Nevada Public Service
stated at the concurrent hearing that his Commission had
not to participate in the cooperative procedure and that
bear only as an interested party. He further stated:

ate of Nevada, therefore, is not interested except to the
hat the users are living in Nevada and, therefore, I will say
are very much interested. I am not prepared to state at
e what the position of our Commission would be, until after
ter of jurisdiction has been decided. That is all the state-
wish to make."

make apparent that there was no inability to agree, and
ada Commission has adopted a neutral position.

ws that, since neither of the circumstances prevail upon
ral Power Commission jurisdiction is conditioned under
jurisdiction properly may be exercised by this Commission
es to Mineral County Power System, at least until such
properly constituted authorities of California and Nevada
o agree on the rates to be charged for such sales.

ring next the effect of Part II upon our jurisdiction, we
discussing the sales to the Navy that that Part gives the
er Commission jurisdiction only over sales "to any person
The sales to Mineral County Power System undoubtedly
sale" but they are not sales to a "person." Section 3(4)
erson" as "an individual or corporation." A "corporation"
(3) "shall not include 'municipalities' as herein defined."
ality" by Section 3(7) means "a city, county, irrigation
inage district, or other political subdivision or agency of a
ent under the laws thereof to carry on the business of devel-
mitting, utilizing or distributing power . . ." Mineral County
m, as we understand it, is the operating name for the County
n its proprietary capacity as the seller of electric energy
us it is a "municipality" as defined in Section 3(7) and

to be regarded to be within the purview of Part II, the provisions of Sections 201(a) and 201(b) apply. Our views heretofore respecting them apply with equal force. Since by the provisions of Part I, Section 20, the California Commission upon the Federal Power exercise jurisdiction, the proviso clauses in Part II operate to deny jurisdiction by denying it to the Federal Power Commission.

In the light of the conclusion we have reached respecting jurisdiction properly to be placed upon our Decision No. 41798, the conclusion that we have jurisdiction over the sales both to the Mineral County Power System, we herewith order as follows:

ORDER

The first and second supplemental applications of California Electric Power Company having been duly considered after hearing and argument of briefs, and it appearing that no further hearing is necessary in the disposal of any of the issues presented, and the Commission concluding that it has jurisdiction in the premises,

IT IS HEREBY ORDERED that the matters upon the supplemental applications herein are submitted.

IT IS FURTHER ORDERED that California Electric Power Company is hereby authorized to charge and collect from the United States for electric service furnished at the Mill Creek hydroelectric plant and transported by the United States to the United States Ammunition Depot at Hawthorne, Nevada, the rates prescribed for such service by Decision No. 41798, viz., the rates set forth in Schedule I attached to such decision.

IT IS FURTHER ORDERED that California Electric Power Company is hereby authorized and directed to charge and collect from Mineral County Power System for electric service furnished at the Mill Creek hydroelectric generating plant and transported by the Mineral County Power System or the United States into Nevada for use by the Mineral County Power System, the rates prescribed for such service by Decision No. 41798, viz., the rates set forth in Schedule I attached to such decision.

IT IS FURTHER ORDERED that California Electric Power Company take all reasonable steps to collect from Mineral County Power System the charges hereinabove referred to from the time of the

increase in rates. One rate in D 45889 amended. (1st Supp. Order).

53 (July 3, 1951). Desert Express granted several extensions of its highway common carrier services including an extension of its pickup-delivery area.

3 (July 3, 1951). Valley Transit Lines granted an in lieu certificate of convenience and necessity as a passenger stage service providing for extensions and reroutings.

(July 3, 1951). City of Riverside ordered to close two grade crossings at the Atchison, Topeka and Santa Fe Company tracks.

8 (July 3, 1951). County of Marin authorized to reopen a grade crossing at Northern Pacific Railroad Company tracks previously closed under D 45800.

DECISION No. 45919, APPLICATION No. 31431

(July 3, 1951)

Water Service Company granted increase in rates charged for water service in Contra Costa District.

James, Matthew, Griffiths, and Greene, by Robert Minge Brown for Phillips and Avakian by Spurgeon Avakian for the Committee to Water Rate Increase; John A. Nejedly, City Attorney, for the City of Clayton; Carl G. Schwarzer and George Leon for the Idyllwood Improvement Association; J. L. Knapp for the Crockett Community Council.

OPINION

The proceeding initiated by California Water Service Company for authority to increase the rates charged for water service in Contra Costa District. That district includes the portion of Contra Costa along the south shore of the Carquinez Straits and Suisun Bay, Oleum and Port Chicago and areas which extend southerly to Clayton Valley to Clayton and through the San Ramon Valley to Martinez. The area served aggregates about 39½ square miles and has a population of approximately 60,000 people. The initial filing of the proceeding was filed on May 25, 1950. Hearings on the proceeding were conducted in Concord on April 26, 27, and May 2, 1951, and concluded on May 3, 1951, in San Francisco and the matter was closed by the close of oral argument.

The Contra Costa District of California Water Service Company is the outgrowth of a system started in 1887 in the town of Martinez to supply industrial demands in the area. In 1889 the Martinez Water Company was acquired, and in 1898 the system was incorporated as the Martinez Water Company. In 1918 the Martinez distribution system was transferred to the City of Martinez. The Port Chicago System, started in 1905 by a private onsite developer, was taken over in 1911 by Bay Point Water Company and in 1916 by the Bay Point Utilities

1929 it had increased to about \$1,358,000, and at the end of 1943 it had increased to about \$6,550,000, so that the present operators have covered about 80% of the plant investment.

Water for the district is obtained from three sources: winter and spring runoff, when Sacramento River water is available; low saline content, water is pumped from Mallard Slough, Pittsburg, a distance of $7\frac{1}{2}$ miles to the one-billion-gallon reservoir. Additional water is pumped from wells in the Government field south of Clyde and the Galindo and Hollar fields north of Concord. These primary sources are supplemented by water from the Contra Costa County Water District supply and the Contra Costa Canal of the U. S. Bureau of Reclamation's Central Valley Project.

Untreated water is delivered to oil refineries and steam generating plants at Avon and Martinez. For other customers, water must be filtered and aerated to eliminate odors and foreign matter, treated to neutralize and reduce bacteriological impurities, and variations in elevation of the areas in which service is delivered from sea level to elevation 600, necessitates the subdivision of the district into 23 pressure zones. To supply water to these pressure zones, to overcome friction losses in the long transmission lines, 31 booster stations are required. At the end of 1950, applicant operated 14 million feet of pipe to serve 14,119 customers, and delivered about 4.1 billion gallons of water. Since 1945, the number of customers has increased 163%, the length of mains 88%, and the volume of water delivered 20%.

Applicant contends that the rates which it is presently charging for water service, and which have remained at levels in effect 28 or more years ago, must now be increased because of increases in the cost of equipment, materials, and services which are required in conducting its operations. Its general manager cited increases as typical, and estimated the combined effect of these increases at about 100%.

<i>Item</i>	<i>Prewar</i>
Mains, 6-inch steel, installed, per ft.-----	\$1.20 ¹
Mains, 8-inch steel, installed, per ft.-----	1.47 ¹
Service, metered $\frac{3}{4}$ -inch, installed, ea.-----	25.30 ¹
Pump, booster, complete installation-----	4,493.00 ²
Tank, elevated steel, 500,000-gal. installed-----	10,994.00 ¹

¹ 1941, ² 1943, ³ 1950, ⁴ 1948.

district under present and proposed rates:

	1950 Recorded	1950 Adjusted Present Rates		1951 Estimated Proposed Rates	
		Company	CPUC Staff	Company	CPUC Staff
-----	\$779,303	\$829,904	\$827,856	\$1,224,834	\$1,230,965
-----	512,592	530,259	512,883	557,400	578,995
-----	71,523	71,044	68,469	226,255	227,447
-----	32,056	32,056	70,100 ¹	36,540	77,100 ¹
-----	616,171	633,359	651,452	840,195	883,542
-----	163,132	196,545	176,404	384,639	347,423
-----	5,822,000	6,090,000	5,822,000	6,785,000	6,616,000
-----	2.80%	3.2%	3.03%	5.7%	5.25%

¹3,100 amortization.

also presented earnings upon depreciated rate bases (un-
less depreciation reserve) with interest on the depre-
included with the annuity as an operating expense. For
adjusted at present water rates, the rate of return by this
% and for 1951 estimated at the proposed rates 5.27%.

above table, it can be seen that applicant's earnings in
present rates were about 3%, and that the proposed rates
about 5.7% on the rate base estimated by applicant as
1. In that estimate, the increase in revenue from new
nts to about 10%, and the proposed rates would increase
34%. About one half of the increased gross revenues are
reased tax liability under the currently effective federal
of 47%.

estimate of net revenue by the sinking fund method is
n applicant's. The rate base also is somewhat less, about
he indicated return is 5.25%. The major difference be-
ates of expenses is \$40,560 in the allowance for depreci-
tization. Applicant's estimate of depreciation expense is
tors developed by Commission staff engineers in a 1937
proceeding, the staff has made a detailed study of the
nce with, and characteristics of, present plant and prop-
estimate of depreciation and amortization expense is based

nce in estimated rate bases is primarily due to treatment
ed in earlier years to develop sources of water supply

the present rates in Contra Costa istriect are insufficient to yield adequate return, and that the increased rates proposed by applicant would not yield more than a reasonable return on the district rates.

The filing of this petition by applicant prompted a strong customer opposition. A large proportion of applicant's customer statements urging this Commission to deny applicant's petition on the basis that rates were already much higher than in comparable communities and adjoining service areas. The Board of Directors of Contra Costa County filed its resolution of September 11, 1968 with the Commission, stating that in the opinion of the Board the petition was not merited, that they would tend to increase the cost of service which they should be denied by the Commission.

Although notices of hearing were sent to all interested parties, no specific presentation in opposition was made by those parties who were listed as appearances. The City of Walnut Creek, through its attorney, took an active part in the proceeding by presentation of testimony and by participation in cross-examination. Generally, the City contended that applicant should not be granted its petition until it improved the quality of water served, increased its operating practices, and established a system of rates which would treat customers with greater equity. In this connection, the City presented the lower separate schedule of rates for the Port Chicago area, contending that wholesale rates to the City's own distribution system were designed to produce the same level of net return for the City as was allowed to applicant, and that applicant's proposed a flat rate charge type of rate be adopted.

Home owners in the area were represented by the Contra Costa County Committee to Defeat the Water Rate Increase. This committee was sponsored by a number of neighborhood improvement associations of Walnut Creek and Concord, the chambers of commerce of these areas, and the Contra Costa Realty Board. It was the opinion of this committee that present rates are extremely high and that the rates are exorbitant, based upon general knowledge of rates in the area and not upon the costs incurred by applicant to supply water. The committee surveyed the water bills in Eldorado Park, a subdivision in the Pleasant Hills area. These subdivisions are solidly built, and are of the currently familiar mass subdivision type of development with lots approximately $\frac{1}{4}$ acre in size with houses in the \$10,000 to \$15,000 price range. Water is used for the usual household requirements and

than those presently in effect tended to restrict the land-area and detracted from the value of property in the communities also fostered installation of private wells and the districts to distribute raw water for garden usage from the Canal to residential areas in the vicinity. Because the rates in the East Bay Municipal Utility District are more favorably charged by applicant, there is considerable local sentiment opposing the District's service area and substituting its rates of applicant.

It is suggested that this application for increases in rates be denied so that applicant seek to improve its earnings in other districts. It is also suggested that the relatively high level of present Contra Costa rates, if raised, would induce extreme hardships on Contra Costa residents and that perhaps such hardships would not be created by other areas.

In view of the contentions suggested by the parties to the proceeding, and after careful consideration, it appears that the continued ability of applicant to meet the expanding demands of its present customers and the needs of the large numbers of new customers who are being added to the service area is at least one of the most important single factors in the community development. If the rate of that development is retarded, then the impact of rising prices on utility costs would be the same recognition as reflected in the price of lots, construction work, and other physical elements of the area expansion. Applicant proposes to withdraw and cancel all flat rate service and to adopt presently effective fire protection schedules. In the original application, it proposed increases in both the quantity rates and minimum rates of its present form of meter rate. It also proposed to retain the same rates in its Port Chicago service area different from that of the remainder of the Contra Costa District.

In view of the evidence submitted herein, applicant furnished a detailed statement of the results of an allocated cost of service study. That study, showing the revenues and expenses of the year 1950 adjusted, indicated that the operating costs, including return on capital, exceeded revenues by 35%. The cost of water varied considerably by classes of customer and by the type of service. In the Port Chicago system, the customer cost was shown to be 14.8 cents per gallon, to which demand costs of 14.8 cents and supply costs

on load factor of the diversion of garden irrigation requiring supply of raw water from the Contra Costa Canal, applicable alternative service charge form of schedule at the hearing asserted that it had designed the service charge form of schedule the results of the cost analysis in spreading the cost of service the objective of producing about the same level of revenue derived from the minimum charge form of rate proposed option. The record shows that estimated 1951 revenues, under the charge form of rate, would be \$9,484 less than the proposed charge form.

The following tabulation indicates typical comparison between the present and proposed rates at a number of consumptions:

MONTHLY BILL					
BASIC $\frac{3}{8}$ -INCH METER					
Consumption Cubic Feet	Main System			Port C	
	Present Rates	Proposed Min. Chg.	Rates Serr. Chg.	Present Rates	Proposed Rates
0-----	\$1.25	\$2.00	\$2.10	\$1.25	\$2.00
100-----	1.25	2.00	2.38	1.25	2.00
400-----	1.40	2.00	3.20	1.25	2.00
1,000-----	3.50	4.94	4.85	2.50	4.00
2,000-----	7.00	9.84	7.60	4.50	8.00
3,000-----	10.00	14.74	10.35	6.00	11.00
5,000-----	16.00	21.94	15.85	9.00	18.00

From the foregoing tabulation, it is apparent that under the present rate practices it is not now possible to implement the Contra Costa Creek's proposal to remove the existing rate differential between Contra Costa Creek customers and all other customers. The use of a "readiness to serve" charge, however, does tend to remove the existing rate differentials.

Applicant supplies raw and finished water to a number of industrial customers. At the time the application was filed, applicant served such customers under special contracts at rates below the filed tariff rates. The effective contracts had been authorized by the Commission. Subsequently, applicant canceled its special contracts for finished water and has since billed such customers at the filed tariff rates. Applicant intends to apply the proposed rates to such customers if authorized. It seeks authority to increase the rates applicable to water service under the existing special contracts for such customers if the present rates make a distinction in charge for water obtained from the river and water obtained from the

connection that the Port Chicago system is entirely separate from the rest of the district and has its own production, storage, and distribution facilities. The water treatment problems are considerable. An emergency standby interconnection between the two systems is maintained. Typical bills for representative consumptions are shown in the following tabulation:

INDUSTRIAL SERVICE		
MONTHLY BILLS FOR RAW WATER DELIVERIES		
	<i>Present Rates</i>	<i>Proposed Rates</i>
<i>River Water</i>	<i>Canal Water</i>	<i>All Water</i>
\$4.00	\$5.72	\$6.22
20.00	28.60	31.10
40.00	57.20	62.20
200.00	286.00	311.00
400.00	572.00	622.00
1,350.00	2,410.00	2,565.00
2,350.00	4,520.00	4,775.00
4,350.00	8,740.00	9,195.00

estimates that the proposed raw water rates would, if applied, result in an increase of about \$15,600 in 1951, an increase in such amount of about 17.4%.

Under the present circumstances, it appears appropriate to authorize application of rate changes, including the alternate schedules of rates proposed in the application herein, that is, those in which the service charge is separated out distinctly from the commodity charge. Particularly in view of the conditions which prevail in this district, it is believed that the proposed rate structure will prove less discriminatory between classes of users than would the type of rate structure presently in effect and now being proposed by applicant to be continued in effect. Applicant has made an oral request that it be authorized to prorate the rates during the first billing period after the effective date of the change upon the basis of the average daily consumption established by the first meter reading subsequent to that effective date in order to avoid the necessity of reading all the meters on the effective date. This procedure appears reasonable and may be followed by the

ORDER

The Water Service Company, having applied to this Commission for an order authorizing certain increases in rates and charges in the Port Chicago District, public hearings having been held, and the matter having been submitted for a decision,

1. Applicant is authorized to file in quadruplicate with the Commission after the effective date of this order, in conformity with the Commission's General Order No. 96, the schedules shown in Exhibit A attached hereto and, after not less than (5) days' notice to the Commission and the public, the said rates effective for service rendered on and after August 1, 1951; and concurrently to cancel existing rate schedules superseded by the schedules hereinabove authorized.
2. Applicant, within forty (40) days from the effective date of this order, shall file with this Commission four (4) sets of regulations governing customer relations applicable to the Contra Costa District, each set of which shall contain a map or sketch drawn to an indicated scale upon a sheet not less than 11 inches in size, delineating thereupon by distinctive lines the boundary of applicant's present service area and the proposed area thereof with reference to the immediate surroundings; provided, however, that such filing shall not be construed as a final or conclusive determination or establishment of the indicated area of service, or portion thereof.
3. Applicant, within forty (40) days after the effective date of this order, shall file four copies of a comprehensive map drawn to an indicated scale of not less than 400 feet to the inch, showing by appropriate markings the various tracts of land within the service area and the location of various properties of applicant.

IT IS HEREBY FURTHER ORDERED that applicant is authorized to revise existing contracts with certain industrial customers for the supply of raw or untreated water, and to incorporate in the schedule of charges shown in Exhibit B attached hereto a new schedule of charges, notice as may be required by the provisions of each of the said contracts, to make said rates effective for such service rendered on and after August 1, 1951, but not earlier than on August 1, 1951. Each such revised schedule shall be prepared in conformity with Paragraph X-A of the Commission's General Order No. 96 and, within thirty (30) days after the date of this order, applicant shall submit two copies of each revised schedule for filing.

The effective date of this order shall be twenty (20) days from the date hereof.

Dated at San Francisco, California, this 3rd day of August, 1951.

MITTELSTAEDT, CRAEMER, HULS, POTTER, MITCHELL, C.

(Exhibits A and B not printed herewith)

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

PNIA ELECTRIC POWER COMPANY,

Petitioner,

vs.

POWER COMMISSION,

Respondent.

er's Reply to Respondent's "Memorandum in
ponse to Pages 15-17 of Petitioner's Reply
ef."

HENRY W. COIL,

DONALD J. CARMAN,

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Riverside, California,

Attorneys for Petitioner.

LAMMACK,

H M. LEMON,

C

FILED

AUG 13 1952



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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PNIA ELECTRIC POWER COMPANY,

Petitioner,

vs.

POWER COMMISSION,

Respondent.

er's Reply to Respondent's "Memorandum in
ponse to Pages 15-17 of Petitioner's Reply
f."

ndent having filed a Memorandum entitled as
urporting to discuss pages 15-17 of Petitioner's
rief, the Court, in response to Petitioner's state-
at Respondent had misrepresented Petitioner's
lowed Petitioner ten days to file this reply.

rgument at pages 15-17 of Petitioner's Reply
headed

The 'Indistinguishable' 25%."

The matter at pages 15-17 of Petitioner's Reply is a subsidiary argument or a "but if" argument. We do contend on the main case that the energy delivered to Navy is not in interstate commerce and is not covered within the meaning of the statute, but at this place we dropped down to a subsidiary position in effect: But if the energy is in interstate commerce and, if some part (say 25%) is resold, FPC has jurisdiction over only the part resold.

The actual statement (Rep. Br. p. 15) was:

"It must be admitted that the remaining energy, at least, is not subject to FPC jurisdiction."

Respondent's Memorandum does not accord with this statement, but says (p. 1):

"Petitioner argues that federal regulation of energy yield to State regulation of its sale to Navy covers only 25 per cent of the energy sold to Navy (emphasis added),

and that (p. 2):

" * * because the admittedly jurisdictional energy flow is mixed with a larger flow of energy which, standing alone, would not be subject to Commission jurisdiction, the entire sale is outside the Commission's jurisdiction." (Emphasis added)*

Petitioner made no such statement; its Reply was succinct and clear to the effect that the 75% of energy

memorandum seeks to make Petitioner say that it would be subject to FPC jurisdiction.

The Respondent, not the Petitioner, which uses "comingling" argument. Petitioner does not admit there is any "comingling" which affects this case at all. It takes any of the energy "indistinguishable." This is the resort of Respondent. Its claim is that FPC has no jurisdiction over energy not sold for resale, because and in the absence of "inextricable comingling."

Record disputes the "inextricable comingling"

Respondent's own Exhibit 32 computes the percentages of sales of total purchased and generated energy as follows:

1943 (last half)	28.6%
1944	19.7%
1945	15.5%
1946	15.8%
1947	20.3%
1948	22.5%

Exhibit 6 [R. p. 105] recites in part:

For the period from 1943 to 1948, inclusive, the percentage of energy resold by the Navy (to the extent purchased from California Electric and generated by the Navy) ranged from 15.4% to 28.6%, the average being 18.7%."

both these quantities are given in Exhibit 32, percentages of energy purchased from Petitioner "resold" can equally well be computed.

Thus, in 1948, there was Purchased	5,355,1
Generated	353,70
Total	5,708,8
"Resold"	1,281,6
% "Resold"	

The 5,355,155 kwh purchased is 93.8% of of 5,708,850 kwh generated and purchased so 22.5% of the total becomes 21.1% of the en chased, which was "resold."

Respondent's theory of "inextricable mixture" on the idea that particles of energy or kilow cannot be distinguished or identified, so that, tities of energy from different sources get into line, they can never be separated. The practice ing two supplies of energy into a line and mete out of the line is too well known to permit quibbling.

Such metering and separation was contem *Idaho Power Co. v. FPC*, 189 F. 2d 665, wh itself, issued a license for a transmission line the Company to receive and transmit over the l with the Company's own energy, energy suppli government. The same thing was actually being *City of Los Angeles v. The Nevada-California Corp.*, 2 FPC 104, 32 P. U. R. N. S. 193, FPC suggested no "inextricable comingling" b

activities of power from the Bureau of Reclamation atasta Dam and returning, not the same kilowatt equivalent amounts to the Bureau at numerous points in the Central Valley. To adopt Respondent's position would push back electrical practice in this country at least 30 years.

Facts cited in Respondent's Memorandum present a different situation from the case at bar. In each of the cases cited, the utility company had, *on its system, mixed and constantly varying supplies of intrastate and interstate energy which were delivered to various customers, at various places, at various times, and in varying quantities. No effort was made by the utility to ascertain the amount of each kind was delivered, from time to time, to several customers.*

The instant case is just the reverse. Petitioner's supply is all purely California intrastate energy. It is delivered for the operation of the Naval Ammunition Depot. It retains those characters until it reaches the Depot on the Depot Reservation, where (we are assuming for argument) an accurately metered portion is delivered by the Navy.

The case is therefore precisely like *Colorado Interstate Gas Co. v. FPC*, 185 F. 2d 357 (C. A. 3). There FPC ordered Colorado Interstate to file a schedule covering *all* of its deliveries to the customers. Here FPC has ordered the petitioner to file a schedule covering *all* its deliveries to the Depot. There the Third Circuit held that FPC could

"inextricable intermixture" of particles of gas the Court can have none with electric energy.

Respondent, at page 3 of its Memorandum distinguish *Colorado Interstate Gas Co.* by the language in which the Third Circuit refused to decide whether the boiler gas was *in fact* sold for consumption or for resale. But, in the present case, we are asked for the sake of argument, that some of the electricity is resold by the Navy. Therefore, *Colorado Interstate Gas Co.* is directly in point on the principle that a utility would be obligated by law to file with FPC only rates applicable to resale energy.

The language quoted in the Memorandum from *Colorado Interstate Gas Co.* is, however, authority for the proposition that this Court need not now determine the question of resale or no resale. That depends on past events and can be determined only for the past. This Court has no way of finding whether there will be resale or no resale in the future. It has no way of knowing whether or not the Navy will continue to sell energy to its employees or to make a charge for electricity even that it will have any tenants to supply.

On the other hand, as suggested by a question from the Bench during oral argument, the Navy might be required to provide general public service in Mineral County; it might extend its lines into the town of Hawthorne (located within the Naval Reservation) in competition with the Mineral County Power System, in which event, it could possibly drive the latter out of business by reason of its ability to quote lower rates, that is, 1 1/2% per kilowatt-hour.

question of whether or not Petitioner must file a
applicable to resale energy is a matter of law;
on of whether in the future there is any resale
red by the schedule is a matter of indeterminable
nts. If the schedule were filed covering energy
resale it would cover any energy so resold; if
e resold, the schedule would have nothing on
operate.

to avoid any possible misunderstanding, we
repeat that the Point in Petitioner's Reply Brief
o in Respondent's said Memorandum and also
a subsidiary point, contingent upon the rejection
ner's main point, to which it still adheres, that
no jurisdiction and can be given no jurisdiction
y some further Act of Congress) over Naval
so as to supersede the power of the Navy
nt to negotiate its own contracts for electric
We know of no authority of the Navy Depart-
a or without the concurrence of the Attorney
o accomplish that transfer of jurisdiction.

Respectfully submitted,

HENRY W. COIL,

DONALD J. CARMAN,

Attorneys for Petitioner.

MMACK,

M. LEMON,

counsel.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CALIFORNIA ELECTRIC POWER COMPANY, a corporation,
Petitioner,

vs.

POWER COMMISSION,

Respondent,

and

DEPARTMENT OF MINERAL, STATE OF NEVADA and UNITED
STATES OF AMERICA,

Intervenors.

for and on behalf of California Electric Power Company for
Filing Petition and Application for Stay of Judgment
and for Writ of Certiorari.

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Attorneys for Petitioner.

WILLIAM MAMMACK,

and
H. M. LEMON,

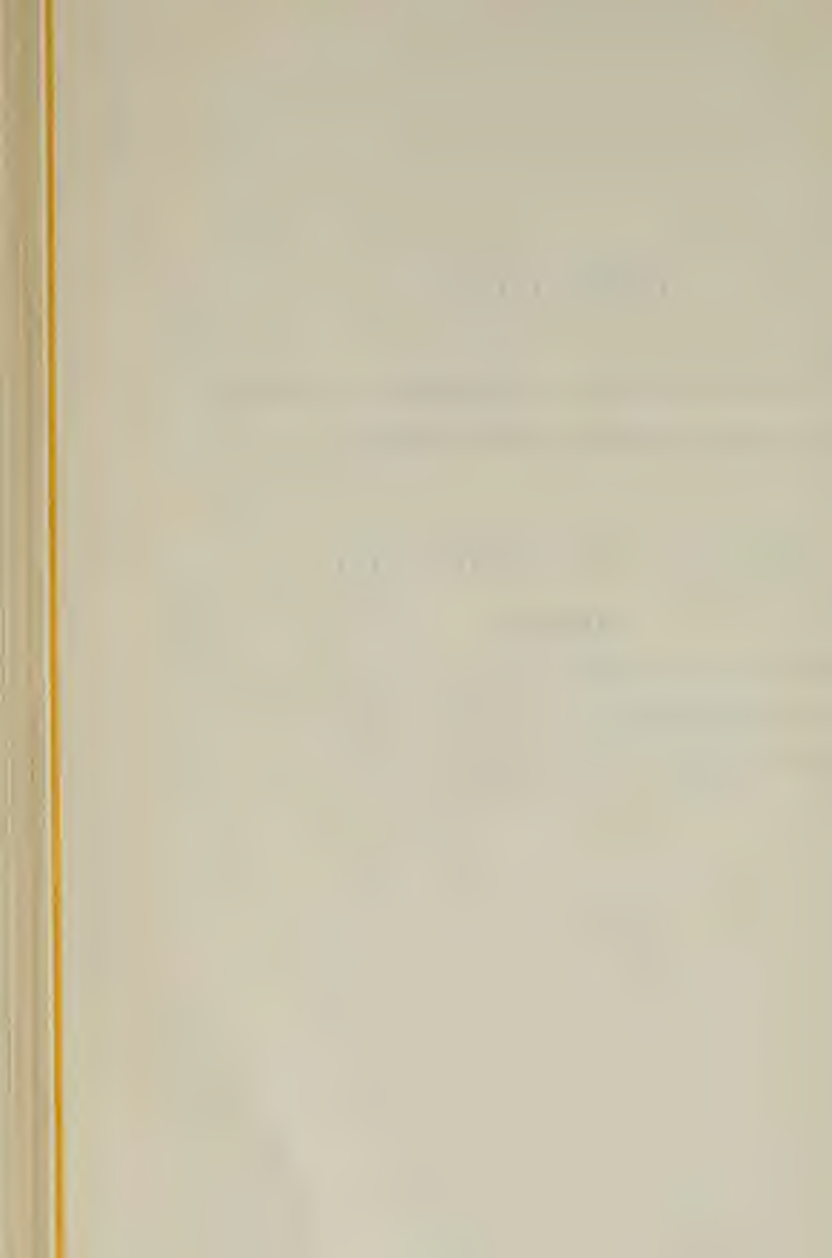
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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE CALIFORNIA ELECTRIC POWER COMPANY, a corporation,
Petitioner,

vs.

THE FEDERAL POWER COMMISSION,

Respondent,

and

THE UNITED STATES OF MINERAL, STATE OF NEVADA and UNITED STATES OF AMERICA,

Intervenors.

PETITION OF CALIFORNIA ELECTRIC
POWER COMPANY FOR REHEARING.

Honorable the Judges of the United States Court
of Appeals for the Ninth Circuit:

The California Electric Power Company respectfully petitions the Honorable Court for a rehearing in the above-captioned case with respect to Point IV of Petitioner's Brief. In support of this petition, Petitioner respectfully shows as follows:

On October 14, 1952, judgment of this Court in the

in said Petitioner's Opening Brief. It is respectfully requested that this Court may have inadvertently overlooked Point IV. Without waiving any objections raised to the Order of the Federal Power Commission and reserving to itself the right to urge all such questions in possible review proceedings before the Court of the United States, Petitioner requests consideration of this point only.

Under Point IV of said Brief Petitioner requests that even if its sales of electric energy to Navy and Mineral County be subject to jurisdiction of the Federal Power Commission, the challenged Order is unlawful. The Order directs Petitioner to cease and desist from charging Mineral County Power System any rates other than those in filed Rate Schedule FPC No. 15 (which was approved by its terms on October 5, 1948) until and unless the expired schedule is duly superseded by a properly supported new filing or by a rate prescribed by the Commission, and directs Petitioner to file as a rate schedule the specific rates and charges set forth in its Agreement dated July 1, 1943, with the Navy (which Agreement was cancelled in accordance with its terms October 5, 1948) such schedule to be effective until and unless it is superseded by a properly supported new filing or by a rate prescribed by the Commission.

The facts are that the contract with the Navy entered into July 1, 1943, was to run for a period of one year and thereafter until 60 days notice of termination by either party to the other. Petitioner, by a 60-day notice, terminated said contract as of October 5, 1948. The Federal Power Commission did not fix or

did not file or require Petitioner to file said rate schedule under its Rules, nor did Petitioner do so. Assuming the Federal Power Commission has jurisdiction over the rate to the Navy, any order for it to make would be one in the nature of a subpoena, either to file rates or to cease and desist from filing rates. If rates were then filed which appeared unreasonable, the Commission could have proceeded under Section 205(e) of the Federal Power Act to order the filing of rates and enter upon a hearing. To order the filing of specific rates contained in a contract entered into in 1943, since which time the purchasing power of the United States revenue dollar has shrunk 50%, without first affording Petitioner a hearing as to the reasonableness of the rates was unlawful and an improper discharge of the duty of the Commission, and if the Order is allowed to stand Petitioner will be deprived of its property without due process of law.

Petitioner and its predecessors have served Mineral County Power System for many years under a series of contracts, the last being one entered into October 1, 1945, providing that, for the term of three years or until terminated by either party, Petitioner would furnish and Mineral County Power System would purchase all of the electric energy required by Mineral County for resale and distribution in the State of Nevada, at rates set forth in the contract. Said contract was filed with the Federal Power Commission as "Rate Schedule FPC No. 15." On October 5, 1948, said contract expired in accordance with its terms and ceased to be an effective and operative rate schedule. Since that time, Mineral County Power System was served in

tornia. Assuming that the Federal Power Co
has jurisdiction over the rates charged Mineral
Power System it could properly have ordered
to file the rates it intended to charge, or cease
sist from service. But to order Petitioner to
desist from charging Mineral County any ra
than those contained in a contract designed f
years, which had expired by its terms and cease
as a rate schedule, without first affording Pe
hearing as to the reasonableness of said rates,
lawful and if the Order is allowed to stand
will be deprived of its property without due p
law.

Wherefore, it is prayed that a rehearing of
be granted and that on such rehearing the Court
the Order of the Federal Power Commission.

Respectfully submitted,

HENRY W. COIL,

DONALD J. CARMAN,

Attorneys for Petitioner

HAROLD M. HAMMACK,

KENNETH M. LEMON,

Of Counsel.

Certificate of Counsel.

I do hereby certify that I have read and know
tents of the foregoing petition and certify that
tion is filed in good faith and not for purposes

DONALD J. CARMAN

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PAVIA ELECTRIC POWER COMPANY, a corporation,
Petitioner,

vs.

POWER COMMISSION,

Respondent,

and

DEPARTMENT OF MINERAL, STATE OF NEVADA and UNITED
STATES OF AMERICA,

Intervenors.

PETITION FOR STAY OF JUDGMENT PENDING CERTIORARI.

*Honorable the Judges of the United States Court
of Appeals for the Ninth Circuit:*

On the 14th day of October, 1952, the Court in the above matter was en-
gaged in a rehearing of said matter. Should said re-
hearing be denied, or should said judgment be affirmed,
Petitioner respectfully requests this Court

to obtain a writ of certiorari from the Supreme Court of the United States, and, as grounds therefor state:

1. That the preservation of the *status quo* in this case pending final decision of the Supreme Court will entail no possible injury to the United States, Navy Department, Ammunition Depot, Hawthorne, Nevada (Navy) or to Mineral County Power System for the reasons:

(a) That Navy is now paying and at all times has paid rates only as set forth in Navy's prior and existing contract and as required by said Order of the Federal Power Commission to be reinstated, Navy having given Petitioner a "letter of intent" binding Navy to pay the higher rates claimed by Petitioner as may be finally determined to be lawful; and

(b) That, while Mineral County Power System has paid Petitioner rates higher than those named in its expired contract, which said Order of the Federal Power Commission requires to be reinstated, Petitioner pursuant to Stay Order of this court filed April 10, 1951, established a segregated reserve for the payment beginning October 5, 1948, of the difference between the amounts actually charged by Petitioner and the amounts which would have been charged under said expired contract. Accruals to said reserve must continue to be made pending final disposition of the review proceedings by the Supreme Court or the further order of this court. Disposition

such accruals to said reserve pending review by the Supreme Court and is ready, willing and able to furnish such further assurance thereof as to this Court may be necessary or proper.

That the enforcement of said Order of the Federal Power Commission which Petitioner believes to be invalid, pending final determination by the Supreme Court of the constitutionality of the Federal Power Commission to enter such an order, would be unfair and inequitable and would constitute a taking of its property without due process of law and would be a taking of property of Petitioner without just compensation, contrary to Amendment V to the Constitution of the United States, for the following reasons:

That, if Petitioner, pursuant to said Order, should publish the schedule of rates required thereby, the rates, say, the rates named in said expired contracts, would probably become the lawful rates pending review in the Supreme Court, even though said order of the Federal Power Commission were finally set aside.

That the difference between the rates claimed by Petitioner to be lawful and the lower rates which would be payable pursuant to said order of the Federal Power Commission to Navy, is approximately \$2,100 per month for the Mineral County Power System, approximately \$1,000 per month; hence, pending review by the Supreme Court, Petitioner would be deprived of approximately \$2,100 per month even though said Order of the Federal

named in a prior and expired contract with County Power System, but also requires Petitioner to repay to Mineral County Power System the difference between said two rates back to October 5, 1948, amounting to not less than \$120,000; and that, if said Order of the Federal Power Commission were complied with, it would thereafter be held invalid by the Supreme Court, and Petitioner would have no remedy to recover from Mineral County Power System the money thus uncollected for its services pending review in the Supreme Court or money paid for past service, for the reason that Mineral County Power System has no income or funds, except as collected from its customers and remaining after payment of its expenses, and funds set apart for other purposes such as depreciation or replacement of property, and has no power of taxation or assessment to raise funds to pay obligations in excess of income, and there would be no way to require Mineral County Power System to charge rates sufficient to pay Petitioner's claim, to hold in reserve money rebated by Petitioner or to set aside reserves to pay for future service at the higher rate.

(d) That the Federal Power Commission has no jurisdiction whatever over Navy or Mineral County Power System and, in the event its said Order were held invalid, the Federal Power Commission could not order or require of them to pay Petitioner any money whatever for any reason or purpose at all.

if Petitioner fails to make application for a certiorari within the period allotted therefor, or obtain an order granting its application, or fails its plea good in the Supreme Court, it shall pay all damages and costs which the Respondent may sustain by reason of the Stay.

Wherefore, Petitioner prays that this court issue an order staying the execution and enforcement of its judgment rendered October 14, 1952, in the above entitled matter, for a reasonable time to enable Petitioner to obtain a writ of certiorari from the Supreme Court of the United States.

This 27th day of October, 1952.

HENRY W. COIL,

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Attorneys for Petitioner.

WILLIAM MACK,

M. LEMON,

Counsel for Petitioner.

United States
Court of Appeals
For the Ninth Circuit.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.

JOSEPH S. GUERIN, RAYBURN B. GUERIN
and ED. R. GUERIN, Individually and as Co-
partners, Doing Business as R. B. GUERIN &
COMPANY, General Contractors,
Respondents.

Transcript of Record

Petition for Enforcement of Order of the
National Labor Relations Board

FILED

United States
Court of Appeals
For the Ninth Circuit.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

EDWARD S. GUERIN, RAYBURN B. GUERIN
and EDWARD R. GUERIN, Individually and as Co-
partners, Doing Business as R. B. GUERIN &
COMPANY, General Contractors,

Respondents.

Transcript of Record

Petition for Enforcement of Order of the
National Labor Relations Board



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Note: When deemed likely to be of an important nature, important matters appearing in the original certified record are printed in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein. When possible, an omission from the text is indicated by *italic* the two words between which the omission seems to have occurred.

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Guerin, Ed R.

—direct

—cross

—redirect

Spicher, Dick W.

—direct

—cross

Witnesses, Respondents':

Guerin, Ed R.

—direct

—cross

Martin, Lloyd E.

—direct

—cross

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Stipulation for Correction of Record....

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United States of America
National Labor Relations Board

CHARGE AGAINST EMPLOYER

Important—Read Carefully

A charge is filed by a labor organization, individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with Section 9 (f), (g) and (h) of the National Labor Relations Act. Instructions: File an original and 4 copies of this charge with the NLRB Regional Director for the area in which the alleged unfair labor practice or is occurring.

Case No: 20-CA-274.

Date: 7/25/49.

Case Status Checked by:

Employer Against Whom Charge Is Brought:

Name of Employer: R. B. Guerin and Company.

Address of Establishment: P. O. Box 201,
South San Francisco; East Grand Ave. &
Marina Way, San Francisco, California.

The above-named employer has engaged is engaging in unfair labor practices within the meaning of Section 8(a), Subsections (1) through three of the National Labor Relations Act. These unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge:

Dick W. Spicher was employed by the above-named company on July 7, 1949, as a mechanic, at a salary of \$2.22½ per hour on the basis of 9-hour day, 6-day week, and was discharged on Friday, July 8, 1949, as a foreman and master mechanic, for the charge that he was not a union member.

It was not known whether or not the above-named company operated under a union contract; however, although Mr. Spicher's work was deemed satisfactory he was discharged maliciously, without regard to the provisions of the above-named sections, by the above-named company at their operations near Alturas, California.

3. Full Name of Labor Organization, Local Name and Number, or Person Charged:

Dick W. Spicher (individual).

4. Address:

1503 Austin St., Klamath Falls, Oregon

ame of National or International Labor
nization of Which It Is an Affiliate or
tituent Unit:

s of National or International, if Any:

tion:

Declare That I Have Read the Above
ge and That the Statements Therein Are
to the Best of My Knowledge and Belief.

y /s/ E. S. HAWKINS,

Attorney in Fact,

2748 Wiard St.,

Klamath Falls, Oregon.

e of representative or person filing

.)

25-49.

f any):

False Statements on This Charge Can
ed by Fine and Imprisonment (U. S.
e 18, Section 80).

ed in evidence as General Counsel's Ex-
-A.]

July 18, 1950.

United States of America
National Labor Relations Board

FIRST AMENDED CHARGE AGAINST
EMPLOYER

Important—Read Carefully

Where a charge is filed by a labor organization or an individual or group acting on its behalf, a complaint based upon such charge will not be filed unless the charging party and any national or international labor organization of which it is a member or constituent unit have complied with Sections (g), and (h) of the National Labor Relations Act.

Instructions—File an original and 4 copies of the charge with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

Case No. 20-CA-274.

Date Filed: 1/5/50.

Compliance Status Checked by:

1. Employer Against Whom Charge Is Filed

Name of Employer: Robert S. Guerin,
Burn B. Guerin, Ed. R. Guerin, d/b/a

Guerin & Co., General Contractors

Address of Establishment: P. O. Box 1000

ber of Workers Employed: Not known.
re of Employer's Business: General Con-
ctor.

ve-named employer has engaged in and
g in unfair labor practices within the
f Section 8 (a), subsections (1) and (3)
ional Labor Relations Act, and these un-
practices are unfair labor practices affect-
ree within the meaning of the act.

f the Charge:

W. Spicher, an individual, was employed
e above-named Company at its operations
Alturas, California, on July 7, 1949, as
ehanic at a salary of \$2.22 $\frac{1}{2}$ per hour on
asis of a 9 hour day for 6 days a week.

or about July 8, 1949, the above-named
pany, acting through its shop foreman and
er mechanic, and by its officers, agents
epresentatives, discharged D. W. Spicher,
individual, because he did not have a clear-
from Operating Engineers' Local Union

the above acts and by other acts and
ct, the above-named Company, acting
gh its shop foreman and master me-
e, and its other officers, agents and rep-
tatives, has interfered with, restrained
coerced its employees and is interfering
restraining and coercing its employees

3. Full Name of Labor Organization,
Local Name and Number, or Per
Charge:

Dick W. Spicher (individual.)

4. Address:

1503 Austin Street, Klamath Falls
Telephone No.: 8216.

5. Full Name of National or International
Organization of Which It Is an
Constituent Unit:

6. Address of National or International,

7. Declaration:

I declare that I have read the ab
and that the statements therein are
best of my knowledge and belief.

By /s/ E. S. HAWKINS,

Attorney in Fact,

20748 Wiard S

Klamath Falls,

(Signature of representative or per
charge.)

Date: January 6, 1950.

Wilfully False Statements on This C
Be Punished by Fine and Imprisonme
Code, Title 18, Section 80.)

[Admitted in evidence as General Cou

United States of America
the National Labor Relations Board
Twentieth Region
Case No. 20-CA-274

e Matter of:

S. GUERIN, RAYBURN B. GUERIN,
E. GUERIN, Individually and as Co-part-
ners, d/b/a R. B. GUERIN & COMPANY,
GENERAL CONTRACTORS,

and

DICK W. SPICHER, an Individual.

COMPLAINT

has been charged by E. S. Hawkins, attorney
for Dick W. Spicher, an individual, that
S. Guerin, Rayburn B. Guerin, and Ed R.
Guerin, individually and as co-partners, d/b/a R. B.
Guerin Company, General Contractors, have en-
gaged and are now engaging in certain unfair
practices affecting commerce as set forth in
the National Labor Relations Act, 29 U.S.C.A., 141
(Supp. 1947), herein called the Act, the
General Counsel of the National Labor Relations
Board on behalf of the National Labor Relations
Board herein called the Board, by the Regional
Director for the Twentieth Region, designated by
the Board's Rules and Regulations, Series 5, as
Section 202.15, hereby is hereby charged.

I.

Robert S. Guerin, Rayburn B. Guerin, R. Guerin, hereinafter individually and referred to as Respondent, are co-partners in business under the trade name and style Guerin & Company, General Contractors, principal office and place of business in San Francisco, California, and with a branch office in Cedarville, California. Respondent is engaged in the business of general contracting and construction work.

II.

At all times material herein the conduct of the business described in paragraph I, a Respondent caused and continues to cause substantial amount of equipment, materials, and supplies to be purchased, delivered and transported in interstate commerce from and through the states and territories of the United States other than the State of California to its offices located in the State of California.

III.

Operating Engineers Local Union No. 1000, International Union of Operating Engineers, hereinafter called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

IV.

On or about July 7, 1949, Dick W. Spence was employed by Respondent to work as a mechanic.

V.

about July 8, 1949, Respondent, by its agents and representatives, and particularly master mechanic, discharged Dick W. Spicher from employ because he did not have a clearance from the Union.

VI.

The acts set forth in paragraph V, above, Respondent did discriminate and is now discriminating against Dick W. Spicher with regard to the hire and tenure of employment and terms and conditions of employment of Dick W. Spicher and did thereby encourage and thereby encouraging membership in labor unions, and did thereby engage in and is engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

VII.

The acts set forth in paragraphs V and VI, Respondent did interfere, restrain and is interfering with, restraining and its employees in the exercise of the rights secured them by Section 7 of the Act, and did engage in and is thereby engaging in unfair practices within the meaning of Section 8 (a) of the Act.

VIII.

The acts of Respondent as set forth in paragraphs V, VI, and VII, above, occurring in connection with the operations of Respondent described

commerce among the several states, and to
to labor disputes, burdening and obstructing
commerce and the free flow of commerce.

IX.

The aforesaid acts of Respondent, as
in paragraphs V, VI and VII, above,
unfair labor practices within the meaning of
Section 8 (a) (1) and (3) and Section 2 (6)
of the Act.

Wherefore, the General Counsel of the
Labor Relations Board, on behalf of the Board,
this 20th day of April, 1950, issues his Order
against Robert S. Guerin, Rayburn B. Guerin,
R. Guerin, individually and as co-partners of
R. B. Guerin & Company, General Contractors,
Respondent named herein.

[Seal] /s/ GERALD A. BROWN,
Regional Director, NLRB
Labor Relations Board

[Admitted in evidence as General Counsel's Exhibit
Exhibit No. 1-E.]

ANSWER OF RESPONDENTS

Now Robert S. Guerin, Rayburn B. Guerin, Guerin, individually and as co-partners B. Guerin & Company, General Contractors, answering the complaint herein on file, say, and allege as follows, to wit:

I.

The allegations contained in paragraphs I of said complaint.

II.

In paragraph III of said complaint, respondents allege that they are without sufficient knowledge or belief to enable them to answer the charges set forth therein, and basing their answer on such ground deny generally and specifically, and every, all and singular the allegations contained.

III.

In each and every, all and singular, generally and specifically the allegations set forth in paragraphs V, VI, VII, VIII and IX of said com-

and for a Second, Separate and Distinct answer to the complaint herein said respondents say, and allege as follows, to wit:

tions as R. B. Guerin & Company engaged in interstate commerce as defined and set forth in the National Labor Relations Act, 29 U.S.C. § 1 et seq., and that by reason thereof this Board has no jurisdiction over said respondents in connection with the matters alleged in the complaint on file.

And as and for a Third, Separate and Cross Defense to the complaint herein said respondents allege as follows, to wit:

I.

That said complaint is defective and said Board is without jurisdiction to proceed in said complaint on the reason of the fact that there has been a misjoinder of necessary parties, to wit, the Associated General Contractors of America, a corporation and its members thereof, and the Operating Engineers Local Union No. 3 of the International Brotherhood of Operating Engineers and the members thereof.

Wherefore, respondents pray the judgment and decision of this Board that said complaint be dismissed and respondents be dismissed.

/s/ JOHN G. EVANS,

Attorney for Respondents

State of California,

City and County of San Francisco—ss.

Ed R. Guerin, being first duly sworn, deposes and says that

led matter; that he has read the fore-
ver and knows the contents thereof, and
me is true of his own knowledge, except
matters which are therein stated upon
n or belief, and as to those matters he
to be true.

/s/ ED R. GUERIN.

ed and sworn to before me this 17th day
50.

/s/ CATHERINE E. KEITH,
blic in and for the City and County of
rancisco, State of California.

mission Expires December 16, 1950.

ed in evidence as Respondent's Exhibit

July 18, 1950.

[Title of Board and Cause.]

STIPULATION FOR CORRECT OF RECORD

It is hereby stipulated by and between
mentioned Company, Respondent herein,
Bamford, Counsel for the General Counsel
transcript in the above-entitled case be co
follows:

Wherever occurring on pages 147,
name "Archie Ball" be changed to
bald."

Dated at San Francisco, California, the
of August, 1950.

ROBERT S. GUERIN, RAYMOND B.
ED R. GUERIN, Individually and
partners, d/b/a R. B. GUERIN & C

By /s/ JOHN G. EVANS,
Counsel for the Re

/s/ HARRY BAMFORD,
Counsel for the Ge
Counsel.

Dated at San Francisco, California, the
of August, 1950.

Received August 8, 1950.

INTERMEDIATE REPORT

Statement of the Case

a first amended charge filed January 6, Dick W. Spicher, through E. S. Hawkins, in-fact, the General Counsel of the National Labor Relations Board, herein called respectively General Counsel and the Board, by the Director for the Twentieth Region (San Francisco, California), issued a complaint dated January 1950, against Robert S. Guerin, Rayburn Guerin, and Ed R. Guerin, individually and as partners, doing business at R. B. Guerin and Company, herein called the Respondents, alleging that the Respondents had engaged in and were engaging in certain unfair labor practices affecting interstate commerce within the meaning of Section 8 (a) (1) of the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act. Copies of the complaint, first amended charge, and notice of hearing thereon were duly served upon Respondents and the charging party.

As to the unfair labor practices, the complaint alleged in substance that Respondents were engaged in the business of general contracting and construction work in the State of California, and in the conduct of that business have caused the transmission of interstate commerce of substantial

charged Dick W. Spicher from their operations near Altus, California, because he did not have a clear card from the International Operating Engineers Local Union No. 3. The International Union of Operating Engineers did not have a card called the Union.

Respondents filed an answer on July 1, 1949, admitting the nature of their business and the employment of Dick W. Spicher in 1949, as a mechanic on their operations in California, but denying the commission of unfair labor practices. It denied that Respondents were engaged in interstate commerce and that the Board had jurisdiction. It also alleged that Respondents were without jurisdiction to proceed in the cause of nonjoinder of necessary parties, the Associated General Contractors of America, called the AGC, and the Union.

Pursuant to notice, a hearing was held on July 18 and 19, 1950, at San Francisco, California, before the undersigned Trial Examiner, designated by the Chief Trial Examiner. The Respondents and Counsel were represented by counsel, and the charging party appeared in person. All parties participated in the hearing, and all parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues.

At the outset of the hearing, General Counsel moved for judgment by default on the

Respondents moved for permission to answer. The record shows that a copy of the complaint, first amended charge, and notice of hearing were properly served by registered mail on Respondents at their main office in South San Francisco, California, on April 21, 1950. Respondents made no excuse for failure to file an answer, other than the statement of their General Counsel, Mr. Evans, that there had been some question about a week before the hearing whether Respondents had retained counsel for the Associated General Contractors of America would represent Respondents in the hearing. Although it appears that Respondents had been frequent in consulting counsel for purposes of preparing the answer, the record also shows that Respondents had pre-trial conferences between General Counsel and Mr. Evans, representing Respondents, about a week before the hearing opened, for the purpose of stipulating certain facts in preparation for the hearing. At the opening of the hearing, Respondents were represented by Mr. Evans and two partners, Ed R. Guerin and Robert S. Guerin. Under these circumstances, the Trial Examiner denied the motion of General Counsel for judgment on the answer by default and permitted Respondents to answer.

During the course of and at the close of General Counsel's case, Respondents moved to dismiss the complaint upon the grounds that they were not engaged in interstate commerce, that the complaint

dition by the Board would not effectuate the purposes of the Act; and that the AGC and Respondents should have been joined as necessary parties. The motions were denied, with leave to renew the motions at the close of the hearing. They were renewed at the close of the hearing on the motions previously stated, and the Trial Examiner rendered his decision. The motions are now disposed of in the findings and conclusions in this Report. Respondents also moved to strike all evidence and testimony of General Counsel relating to the AGC, its membership, the nature and volume of business of the AGC, and the contractual relations between the AGC and the Union; decision on that motion is now reserved; it is now denied for reasons stated hereafter.

All parties presented oral argument before the Trial Examiner at the close of the hearing. Respondents have not availed themselves of the opportunity afforded them to file briefs and propose findings of fact and conclusions of law.

Upon the entire record in the case, and upon my observation of the witnesses, I make the following findings of fact:

Findings of Fact

1. The Business of the Respondents

During the year 1949 and at the time of the hearing, Respondents Robert S. Guerin, Raymond S. Guerin, and Ed R. Guerin were engaged in the business of operating a

rin & Company, with their principal office South San Francisco, California, and a office in Cedarville, Modoc County, California, during the period from June 1, 1949, to 1950, Respondents engaged in construction as prime contractor or subcontractor on five construction operations within the State of California. The contract prices of these projects aggregated approximately \$745,762.37. Four of the contracts involved filling, excavating, grading, and clearing of ground in preparation for building construction in San Francisco and South San Francisco, California, and totaled approximately \$62,000. These contracts had been completed prior to the hearing.

The fifth project, known as the "Modoc job," was a time contract with the California State Department of Public Works for the clearing, filling, and drainage of 8.1 miles of California Highway No. 28 between Tom's Creek and Cedarville in Modoc County, California,¹ at a contract price of approximately \$683,522.57. This operation constituted by far the major portion of Respondents' business in the above fiscal period, and was in progress at the time of the hearing. It was the only project involved in this proceeding. The performance of the above contracts during

the approximate location and size of the project involved by the portion of Highway No. 28

the fiscal period stated, Respondents made purchases totaling approximately \$629,230; this figure included \$359,488.19 for the direct purchase of materials and equipment, including cement, reinforcing steel, corrugated pipe, kerosene, gas, oil, Diesel fuel, and related items from sources entirely within California, and \$269,741.81 for rental of trucks, Caterpillar tractors, and other heavy equipment. Respondents' other purchases were approximately \$18,765.00, which amounted to about 3 per cent of their total purchases or about 5 per cent of the total material and equipment purchases. Respondents purchased 100 per cent of their rented equipment from dealers within California; approximately half of it was rented with the option to purchase which were never exercised. The value of equipment comprised between 20 and 30 per cent of the total value of purchases valued at about \$300,000; 6 of these were rented and were valued between \$100,000 and \$200,000; most of the new items were Caterpillar equipment, which, though rented from dealers in California, had been almost wholly manufactured and assembled in the State of Illinois.

California State Highway No. 28, involved in the "Modoc job," is a standard two-lane highway which runs from Redding, Shasta County, northeastward to and across Modoc County, California, and thence to the Nevada border where it connects with Nevada State Highway No. 20. From Redding to Albany, Calif.

Highway No. 28 continues as a segment of Highway No. 395 for about 10 miles, and then off eastward and continues to the Nevada-U. S. Highway No. 395 is a main traffic connecting lower Oregon, northern California and the eastern portion of Nevada. U. S. Highway No. 28 traverses the northern part of California from the coastline to Alturas where it joins U. S. Highway No. 395. The portion of California State Highway No. 28 between U. S. Highway No. 395 and the Nevada line appears to be the main traffic connecting Modoc County and the northeast corner of California with the adjoining northwest corner of Nevada.²

On July 8, 1949, Respondents, as a partner-ship, has been a member of the Northern California Association of Associated General Contractors of America (NCAAGC), a corporate organization of approximately 280 persons, firms, and corporations engaged in the highway and heavy engineering construction business in the northern part of California. The main purpose of the organization is the improvement of conditions under which its members operate and one of its main functions is the negotiation and execution of labor agreements on behalf of its members with various labor organizations.

The above findings are based on uncontradicted testimony of Ed R. Guerin, a sum- mary of Respondents' transactions prepared by him (Exhibit No. 2), and trans-

The members of the Northern California Association of AGC during 1949 performed about 12 of all heavy engineering and highway construction in northern California, doing a gross value of work in that area in excess of 150 million dollars. 12 of its members³ performed construction during 1949 outside the State of California. The Board has previously taken jurisdiction over the work of these members⁴ in proceedings under the National Labor Relations Act.

The AGC has negotiated and executed agreements with its members master collective bargaining agreements with the Union dated May 27, 1948, and July 15, 1949, which covered wages and other working conditions of all employees including heavy-duty mechanics, performing work within the recognized jurisdiction of the AGC. These agreements were binding upon the AGC during the periods of their operation. The agreement of May 28, 1948, was effective from that date and remained in effect until April 1, 1949, when the agreement dated July 15, 1949, became effective.

³Guy F. Atkinson Company, Bechtel Company, Bates & Rogers Construction Corporation, Corporation, Peter Kiewit Sons' Company, Inc.; A. Teichert & Sons, Inc.; Utah Construction Company, J. R. Reeves, Brown-Ely Construction Company, West Piping & Supply Co., Inc., and Foster Construction Corporation.

⁴Guy F. Atkinson Co., 90 NLRB 1000; NLRB 88; J. R. Reeves and A. Teichert

and remained in operation until April 30, the terms and effect of these agreements considered further in the discussion of the of Dick W. Spicher.

above facts Respondents argue that (1) is without jurisdiction because they are engaged in interstate commerce; and (2), if engaged in such commerce, their operations have so much effect on that commerce that the assertion of jurisdiction by the Board would not effectuate the purposes of the Act. I do not agree with this contention. Respondents' out-of-State purchases of \$100,000, their rental of equipment valued at \$10,000, which had its origin in another State, the fact that during 1949 and 1950 over 90 per cent of their business consisted of the reconstruction of a substantial part of a main traffic artery connecting California and Nevada which also comprises a substantial portion of a network of U. S. highways linking California with Oregon and Washington all indicate that Respondents' operations

above findings as to the AGC are based on the uncontradicted and credited testimony of Winfield Brown, the 1950 membership roster of the North California chapter of AGC (General Counsel's Exhibit No. 5), and the AGC-Union collective bargaining agreements of May 28, 1948, and July 15, 1948 (General Counsel's Exhibits Nos. 3 and 4). Labor agreements were also signed by officers of the Central California chapter of AGC, which comprised of persons, firms, and corpora-

in that period, particularly on the "Mo had a substantial connection with interstate commerce. It is clear that a labor dispute and stoppage of work on the reconstruction Highway No. 28 would have deprived persons and firms travelling in interstate commerce between northern California and Nevada of the use of the main artery of traffic between those States at that point. The Board has recently taken jurisdiction over other general contractors engaged in highway road construction who did less business in interstate commerce than Respondents, and less out-of-State purchases than Respondents. See the Matter of Brown-Ely Co., 87 NLRB 1000; the Matter of J. R. Reeves and A. Teicher, Inc., 89 NLRB No. 1. In those cases the Respondents were involved, among other work, in the construction of U. S. highways. Although Respondents were not working directly on a U. S. highway for the Federal Government, I see no less reason for the assertion of jurisdiction here, since over 90 per cent of Respondents' operations involved a State highway which is not only a segment of a national U. S. highways, but also the main artery of interstate traffic connecting that network in California with the State of Nevada.

General Counsel offered the evidence concerning the organization and functions of the Northern California chapter of AGC, its contractual relations with the Union and Respondents' membership therein, solely on the question of jurisdiction to

tions between the members of AGC and
a, and a consequent impact upon interstate
. General Counsel disclaimed any inten-
now by this proof a common labor policy
and the Union as motivating the discharge
here. Respondents therefore argue that
ence is immaterial and should not be con-
n the question of jurisdiction alone, that
ly be considered by the Board for that
f offered to show a common labor policy
rties and AGC, in which event AGC and
are necessary parties to this proceeding.
theory, Respondents moved to strike the
in question and also to dismiss the pro-
for nonjoinder of AGC and the Union.
on based on nonjoinder of parties will be
l in the discussion of the merits hereafter.
r the evidence in question relevant and
for the following reasons: The operations
mbers of the Northern California chapter
outlined above, both within and without
of California, clearly have a substantial
n interstate commerce. Furthermore, al-
espondents' membership in AGC became
July 8, 1949, the very day of the alleged
charge of Spicher, it appears from the
dicted testimony of Respondent Ed R.
at Respondents' predecessor firm, Guerin
in which he had also been a partner, was
e of AGC for many years past during

agreements between AGC and the Union. The facts indicate a continuing identity of interest between Respondents and their predecessor AGC, in their relations to the Union, which dates the events of July, 1949, alleged in the complaint. Finally, in the bargaining period ending April 30, 1949, the termination date of the master agreement between AGC and the Union, on July 15, 1949, the effective date of the new contract, a labor dispute between a member of the Union and the Union might impede the progress of negotiations and consummation of the new contract, which would have a direct effect on the over-all labor relations of the AGC and its members, and could lead to a labor dispute causing widespread interruption of the operations of the members.

Respondents' argument also involves the doctrine of sequitur. I know of no rule of evidence or administrative procedure which requires General Counsel to offer this proof on the main issue of the discharge, to support a theory not advanced by him, before the Board can consider the issue on the preliminary issue of jurisdiction. In other words, before offering this evidence to show the labor difficulty of one member of AGC might have a wide impact on the broad relations of its members with the Union, General Counsel is not required to first offer the evidence to prove, in reverse, the over-all AGC Union relationship, and

and material on one point has been re-
can be considered by the Board if relevant
ial on any other aspect of the case. In
ction, the significance of the contracts
AGC and the Union, and Respondents'
ion of them, will be considered below in
the discharge of Spicher. Respondents'
strike the above evidence is therefore

basis of all the foregoing facts and con-
, I find, contrary to Respondents' con-
that Respondents are and have been
interstate commerce, and that the asser-
jurisdiction over their operations would
the policies of the Act.⁶

The Labor Organization Involved

g Engineers Local Union No. 3, of the
nal Union of Operating Engineers, is a
nization within the meaning of Section
ne Act, which admits to membership em-
Respondents.

II. The Unfair Labor Practice

le issue in the case is whether Respond-
rged Dick W. Spicher from their employ
1949, because he did not have a clearance
Union.

. Spicher, a resident of Klamath Falls,

Oregon, came to work for Respondent
"Modoc job" on July 6, 1949, as a h
mechanic. That work involves the major
and repair of heavy transportation and
tion equipment such as Caterpillar tract
dozers, excavating shovels, and trucks o
types. Overhaul and repair of such equi
quires the disassembly and assembly, wit
ment of parts, of transmissions, rear end
final drives, and other components.

Spicher came down to the Modoc job a
quest of one Murien, of Murien and Cox
tractors of a portion of the clearing wo
project. This firm was using two Caterp
tors for the clearing work, and in th
thereof, Murien had asked Respondents
one of the tractors overhauled by their m
Murien became dissatisfied with the wor
mechanic, whereupon Ed R. Guerin told h
a mechanic is satisfactory to him, arrangi
the man chosen by Murien and charge M
Cox for his labor and the cost of parts and
used in the overhaul. Murien then
Spicher through a mutual acquaintance a
him to come to work on the job, advising
ents' field office of his choice. An office
of Respondents called Spicher on July
advising him to come to Cedarville at on
they needed him, and also advising that
ents had already cleared him with the

ld office at Cedarville on the afternoon
th, Murien met him and took him into the
e, where an employee of Respondents had
some paper for Respondents' records.
ld not work that afternoon, but reported
the next morning, July 7, at the shop,
was assigned by Lloyd Martin, master
of Respondents, to go out on the project
ul equipment. He went out on the job
tools and worked on Murien's tractor and
ipment that day.

Spicher reported for work July 8, 1949,
ld him to come back to work on the eve-
, starting at 3:30 p.m. When he returned
fternoon to start that shift, he met one
, business agent of the Union, outside
nts' shop and office, and had a discussion
At the outset of the conversation, Martin,
a member of the Union, was inside the
y a few feet away. Archibald asked
f he had his union book and clearance
Union. Spicher replied that he did not
book with him, and that he had been
ith the Union through Respondents' office.
moment Martin came up to them, and
asked Martin if he had seen Spicher's
When Martin said he had not, Archibald
Spicher he could do nothing for him,
e had men at the union office waiting for

said "Yes," and as he and Archibald wa together, Martin told Spicher, "I guess you, then." Spicher did not work that was paid off for his work on July 7, 1949 left the job.⁷

Spicher has not worked for Respond July 8, 1949. Respondents made him a tional offer of reinstatement on September

Respondents claim that Spicher was mistake, that he was not a qualified mechanic, and that he left the job of his on July 8, 1949, either because he disc could not do the work, or because of s pulsion from the Union. In support of of a mistaken hiring, Ed R. Guerin tes he and Murien found Spicher working Murien's tractors (apparently on July Murien indicated he had never seen Spich

⁷The findings of the above events an sation are based upon the credible tes Spicher. Archibald did not testify in th do not credit the denial of Martin that any of the conversation or that he c Spicher: he admitted that he was close the conversation, and that he had bee Archibald earlier that day that he was Spicher, a nonunion man, on the job; h of testifying and attitude on the stand w and not straightforward; much of his was vague and equivocal, and some of it s dictory; and in general his testimony w in candor and other indicia of veracity. I

Spicher "where the other man was," to Spicher replied that the other man got his back and sent Spicher in his place. I reject his testimony because I have already found, on the basis of Spicher's credible testimony, that he had talked with Murien about the job beforehand, and that he met him when he first arrived at the project and that he was signed up by Respondents. Martin's testimony is supported by the significant fact that Martin, in his version of the meeting between him and Murien, did not indicate that either Murien objected to Spicher's continuance on the job, nor that Murien, who was a "pretty fussy" man about the overhaul and care of his tractors, had ever criticized Spicher's work. Murien was called by Respondents to testify. It is clear from the evidence on this point, and I find, that Spicher was not a stranger to Murien on July 6, 1954, that Murien brought Spicher down to the job, and that there was no mistake about his employ-

ment. In support of the claim that Spicher was not a competent mechanic, Martin, the union master mechanic, testified that he checked on Spicher's work frequently during the day that he was on the job, and concluded that Spicher was not a capable mechanic. I do not consider Martin's testimony on this point worthy of any credit. Although he claimed to have 30 years of experience in work on heavy machinery, he could not recall a single detail about

in vague statements, such as that Spicher doing the work in a "workmanlike manner," his "methods were wrong," and the like. He stated his inability to recall details of Spicher's statements on July 7th to the fact that "it has been a long time"; yet he was able to recall and quote a conversation with Archibald, the agent of the company, about Spicher which occurred the very next day, July 8th. Moreover, although Spicher appeared to him to be incapable of doing the work, Marshall talked to him about his ineptitude, nor did he take steps to correct his "wrong" methods. Spicher grudgingly admitted, on the other hand, that Spicher did some parts of his work "fairly well" that he appeared qualified to do some of the work of heavy-duty mechanic. Respondents rely on Spicher's admitted errors in details of the type of tractors which he operated for them, but I consider this of no significance in the face of Spicher's own credible testimony of his experience of over 16 years as a heavy-duty mechanic in which time he had worked on a great deal of heavy construction and transportation equipment; his failure to remember details of a particular type of tractor on which he had not worked some time does not detract from the general reliability of his testimony. On the basis of the evidence on this point, I am satisfied, and I find, that Spicher was qualified to do the work assigned to him by Respondents, and that

intention that Spicher left the job because compulsion by the union agent, Archibald, directly on Spicher, is not supported by the evidence and is completely refuted by the substantial evidence of Spicher, corroborated by the admissions of Guerin and Martin, which have been discussed above.

Respondents claim that Spicher's testimony as to the circumstances of his discharge is inherently unreliable, and that at most it proves only that he left the job after a talk with the union agent. The court has already resolved the issue of credibility in the findings made above. However, if I had not done so, it would be about whether Respondents discharged Spicher and the reason therefor, it is set at rest by the admissions of Respondent Ed R. Guerin, master mechanic, Lloyd Martin, which not only support Spicher's testimony, but also clearly show that he was discharged by Respondents in connection with a discriminatory hiring policy pursued against them on the Modoc job.

Guerin was called as an adverse witness by General Counsel. At first he repeatedly testified that Respondents did not know or care whether their employees on the Modoc job did or did not belong to the Union, and that it was not their policy to hire only persons approved by the Union. When confronted with a letter he sent to Spicher stating Respondents' version of the discharge, however, he admitted that their policy on

union men on the job, Respondents would a man who was not cleared by the Union after Spicher's discharge and when the Office of the Board wrote Respondents dated July 25, 1949, requesting Respondents' opinion of the discharge, Guerin had Respondents' bookkeeper on the job investigate the circumstances and prepare a reply to the Board under date of July 28, 1949, which Guerin signed and sent. The letter states, in pertinent part:

To the contrary, Mr. Spicher was not discharged upon the authority or instigation of our master mechanic nor by any partner of our company but was informed personally by a business representative of Local No. 1 of the Redding Engineers of Redding that he was not to work on this or any other project until he was reinstated and became a member in good standing. We were likewise told by the business representative that we could not keep this man on the job in violation of our contract with the Association agreed by the Associated General Contractors of America, Incorporated, of which we are a member. This Association represents all contractors and negotiates all contracts with Labor Unions entailing all types of work. Furthermore, it is our understanding that we must employ union members in good standing or those willing to become affiliated with a union or else have the unions pull the

ed by General Counsel to explain the last
d sentence quoted above, Guerin testified:

It was up to the Union delegate to sign
up and give them permits to ask them
in the Union, which happened in many
up there. It is happening right now up

Well, was it your policy if the Union
ed to clear a new employee that you would
refuse to hire him or keep him on your
ll?

It was agreed when we went on the job
they would clear anyone that was com-
t enough to handle a job up there. I am
g about carpenters or 'catskinners or
l crews or grease monkeys or mechanics—
f the crafts that we had to have to accom-
the job.

Well, on your part was it your agree-
that you would employ only those who
cleared by the Union?

Yes. What else could we do, if they
pull their regular members off? We had
adred and fifty, two hundred people up

Was this policy made known throughout
operation to your supervisors?

Absolutely.

was questioned further about the prepara-

The Witness: Well, I think there sort of a citation came in and it was up and he said, "I think I have got generally briefed out" and he wrote just glanced through it and signed it. I believe I'd do it again. I don't see anything wrong with it. We are under contract to have a penalty for completion and otherwise and Number one is to have good plenty of help and no beefs with the Unions or anybody else.

* * *

Q. (By Mr. Bamford): Wasn't it an arrangement between you and the Engineers that if you hired a new man through the Union but on your own man would join the Operating Eng-

A. Yes, ultimately. They were death to do that.

Trial Examiner Frey: Did you ask or order them to join under your and training practices?

The Witness: No, we didn't care if they joined or not, but what are you going to do, Mr. Examiner, when just for the one individual probably a hundred walk off the job. That makes it plain to you know. You can't swim upstream in this business, but we wouldn't individually

of a case where a man had an opportunity to go in the Union—I have never heard any case where they weren't willing to go that would relieve us of any further beef

* * *

(By Mr. Bamford): Wasn't it the understanding up there in that Cedarville job, Maurin, that all the heavy duty mechanics belonged to the Operating Engineers or were cleared by them?

Get cleared, I will go for that, yes.

He was asked by the Trial Examiner to explain his statement "you can't swim upstream in this business," he testified as follows:

Examiner Frey: What did you mean by that statement?

Witness: I meant this: in other words, I believe it came about through asking me questions about how long I had been in the business, in the contracting business, and I said I was in before the Union got really heavy, I believe in the last World War they came very much to prominence, and naturally all our jobs—we would like to have them go on peacefully and finish them on time, and that's why I meant we couldn't swim upstream. We had to go along with the trend.

Examiner Frey: You mean you had

Trial Examiner Frey: Does that mean that you were afraid that if one individual kept on the job the Union would take action against you?

The Witness: Well, that is possible.

Trial Examiner Frey: Well, is that what you mean by that statement there?

The Witness: Yes, I will say that that is what I meant, yes.

* * *

Q. (By Mr. Bamford): I am asking you how your policy was; not how many men were up there. Wasn't it your policy that everybody, all of your heavy mechanics and your operators too, I suppose, were to be organized with Local 3?

A. Well, sure.

Q. And that policy was made known to the supervisor, is that correct?

A. Certainly. They were all Union men.

Q. And your master mechanic, Lloren, was a supervisor?

A. That is correct.

Trial Examiner Frey: Was he a Union man?

The Witness: Yes.

It is clear from the record that Martin had the power to hire and discharge employees.

When Guerin testified for Respondents that when he signed the letter of July 2, 1933, he was a Respondent, he was a Respondent.

ending the letter he discussed it with his
and regarding that discussion he testified:

(By Mr. Bamford): In your conversation with Mr. Evans, did you discuss the matter whether or not there was a contract between Operating Engineers Local 3 and the AGC?

Well, I assumed that he would know that. In other words, we had been getting help and mechanics and operators out of that local ever since it was formed, and I don't believe that in any phase of it I mentioned to him.

And by "getting help and operators" of the local, you mean that there was a contract, you thought that there was a contract?

Yes.

Not only at the time that the letter was written but at the time that Spicher was terminated from your company, is that correct?

Oh, yes. In fact, I have sat in on the meetings, some of the beefs between the union and the contractors. Of course, this is a new firm since we started, this R. B. Guerin and Company, but I was a member of the firm of Guerin Brothers and we were a charter member of the AGC for many years, and we would sit down with the different unions on working out the working conditions, wage scales, and I presumed we were within a contract at that time.

And the contract provided that you had to employ union members in good standing on

A. I understood, with the contract man had ninety days to join the union, I think that is the policy that we follow there. I believe I have read the Wagner Act, and at that time I don't think I had a copy of the Taft-Hartley Act.

It is clear from the record that there was no existing collective bargaining contract in existence between AGC and the Union on July 8, 1948. Spicher was discharged. The master agreement was made May 28, 1948, between AGC and the Union, which Guerin was undoubtedly familiar with, in Section 3 thereof:

In the hiring of employees covered by this agreement, preference shall be given to the Employer and the individual employer hereby to persons who have been employed by Northern California between May 1, 1948, and May 31, 1948, on any work covered by the Master Agreement dated May 29, 1948. For any individual employer covered by this Agreement.

Whenever any individual employer hires new men, he shall post a written notice on the bulletin board and shall notify the Union at the same time, which notice shall be given at least forty-eight (48) hours before the men are needed on the job, whenever possible. For the purposes of this paragraph it shall be deemed that such notice be given to the Union.

area in which the job is located. Upon such being given, the Union agrees that it will furnish an adequate supply of competent employees if they are available.

The Collective Bargaining Representatives agree that, if and when a union security clause lawfully be written into this agreement, they will then promptly enter into negotiations concerning hiring and union security clauses. If when hiring and/or union security clauses are written into this agreement pursuant to the negotiations, then this section shall forthwith become inoperative.

Section 8 of the master agreement effective July 1, 1947, between the same parties contained an identical provision, with the exception of an addendum in reference to the previous agreement of May 1947. It does not appear from the record that these agreements had been authorized unconditionally in proviso to Section 8 (a) (3) of the Act. Since neither of them were in effect at the time of Spicher's discharge, the exact effect and scope of the hiring provisions quoted above are not at issue in this proceeding. The agreements are relevant and material only to the question of Respondents' interpretation of their hiring provisions indicated the hiring policy that Respondents followed in the hiring and subsequent rehiring of Spicher. Guerin's testimony quoted

contracts was in effect on July 8, 1949, under his interpretation of it Respondents required to hire only heavy-duty mechanics cleared by the Union and, as a corollary, could not retain in their employ any such not cleared by the Union, under pain of stoppage or strike.

The testimony of Martin also indicates that the policy was in effect when Spicher was hired. Martin admitted that an agent of the Union visited the project regularly once a month to clear nonunion workmen whom Respondents had hired. He testified that all Respondents' employees on the project were union men when hired, or signed up with the Union within 90 days. I do not credit his or Gunderman's testimony as to the 90-day clearance, however, because neither of the contracts upon which Respondents relied contained such a provision; and it was not applied in the case of Spicher, the only nonunion man cleared by the Union. I likewise reject Martin's testimony that the Union had agreed to hire nonunion men hired by Respondents on the project because help was scarce: the facts for the record indicate that this procedure was not followed in Spicher's case; and while Martin intimates that the Union refused Spicher a clearance because he was not a qualified mechanic, that excuse is not supported because Respondents expressly disclaim any fault in discharging Spicher because he was inefficient. Finally, there is no proof in the record that the union

careful consideration of all the pertinent in the record, I am convinced that the force of credible evidence shows, and on thereof I conclude and find, that Dick W. was discharged by Respondents on July 8, because he was not cleared for work on the project by the Union, and that by such dis- respondents discriminated against Spicher to his hire or tenure of employment and or conditions of his employment, in order to gain membership in the Union, and thereby in violation of Section 8 (a) (3) of the Act. By such dis- crimination against Spicher, Respondents also inter- fered with, restrained, and coerced their employees in the exercise of rights guaranteed to them by Sec- tion 8 of the Act, in violation of Section 8 (a) (1) of the Act.

The Nonjoinder of Parties

In answer and at the hearing Respondents asked that the complaint be dismissed for non- joinder of AGC and the Union as necessary parties, and that introduction of testimony by the respondents' counsel as to labor relations between AGC and the Union indicated that General Counsel was going to prove the discharge of Spicher was in violation of a common labor policy of AGC and its (including Respondents) with the Union, and that on this basis both AGC and the Union should be charged with violation of the Act and

July 28, 1949, to the Board, that the Union Respondents, was responsible for the discharge.

These arguments misconceive the basis of the complaint. The only charges before the Board on the record are against the Respondents, and on the face thereof the complaint only charges Respondents with a violation of the Act. The complaint does not allege, and General Counsel did not claim to prove, that the discharge was the result of the application of a common labor policy by the Respondents and its members. Nor does the complaint charge a violation of 8 (b) of the Act.

Under the Act the Board is empowered to prevent unfair labor practices and to issue a remedy only against parties named in the complaint. Where no charge is filed and no complaint is issued against another party, it is without power to issue an order against such other party.¹¹ The record in this case does not disclose whether charges were filed or complaints issued against parties other than Respondents. Under these circumstances, the Examiner has no power to require General Counsel to change the theory of his complaint or to add an additional cause of action which would require the presence of AGC and the Union, either Respondents or others of their liability for the discharge found above, or to make others share that liability. On this state of the pleadings and the record, the remarks of the Board in Carpenter and Sons v. General Contracting Employers Association

. 78, relied upon by Respondents, are not in this case. The motion of Respondents for the complaint for nonjoinder of parties is denied.

The Effect of the Unfair Labor Practices Upon Commerce

Activities of Respondents set forth in Section I, occurring in connection with the operation of the Respondents described in Section I, have a close, intimate, and substantial relationship to interstate, foreign, and commerce among the States, and tend to lead to labor disputes which obstructing commerce and the free commerce.

V. The Remedy

I have found that Respondents have engaged in unfair labor practices within the meaning of Sections 8 (a) (1) and 8 (a) (3) of the Act, I will order that Respondents cease and desist therefrom and take certain affirmative action in order to effectuate the purposes and policies of the Act.

I have found that Respondents discriminatorily refused to hire Dick W. Spicher on July 8, 1949, because he was not secure a clearance from the Union. Since Respondents made an unconditional offer of reinstatement to Spicher on September 21, 1949, I will recommend that any further offer be made. I will recommend that Respondents make

of pay be computed on the basis of each calendar quarter or portion thereof during the period from Respondents' discriminatory discharge on September 21, 1949, the date of Respondent's reinstatement; the quarterly periods, hereinafter called "quarters," shall begin with the first of January, April, July, and October. Loss of earnings shall be determined by deducting from a respondent's earnings to that which Spicher would normally have received for each quarter or portion thereof, his earnings,¹² if any, in other employment during the same period. Earnings in one particular quarter shall have no effect upon the back-pay liability for any other quarter. It is also recommended that Respondents be ordered to make available to the Commission upon request pay roll and other records to facilitate the checking of the amount of back pay.

Although it has been found that Respondents discriminatorily discharged only one employee in violation of Section 8 (a) (1) and (3) of the Act, no other violations have been alleged, and

¹²By "net earnings" is meant earnings less expenses, such as for transportation, room, and food, incurred by an employee in connection with his finding work and working elsewhere than for Respondents, which would not have been incurred by him in his unlawful discharge and the consequent loss of his seeking employment elsewhere. See *Monier v. Lumber Company*, 8 NLRB 440. Monier was ordered to be paid for work performed upon Federal, State, and municipal, or other work-relief projects.

the nature of the unfair labor practice found, the circumstances under which it occurred, and the record in the case in my opinion discloses an intent and purpose by Respondents to interfere with the rights of employees guaranteed by the Act, and convinces me that the unfair labor practice found is persuasively related to other unfair practices proscribed by the Act, and that the likelihood of their commission in the future is to be attributed to Respondents' course of conduct in the past.

4 The preventive purposes of the Act will be achieved unless the order is coextensive with the unfair practices found. Therefore, in order to make more effective the independent guarantees of Section 7 of the Act and to prevent a recurrence of unfair labor practices, I hereby minimize the industrial strife caused thereby and thus burden and obstructs commerce and thus frustrates the policies of the Act, I will recommend that Respondents cease and desist from in any other way interfering with, restraining, and coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

On the basis of the above findings of fact and the entire record in the case, I make the following

Conclusions of Law

The International Brotherhood of Operating Engineers Local Union No. 3 of the International Union of Operating Engineers, is a labor organization within the meaning of Section 2 of the Act.

2. By discriminating in regard to the tenure of employment of Dick W. Spiche encouraging membership in the above labor organization, Respondents have engaged in engaging in unfair labor practices within the of Section 8 (a) (3) of the Act.

3. By such discrimination, thereby interfering with, restraining, and coercing their employees in the exercise of the rights guaranteed in of the Act, Respondents have engaged in engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

4. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

Recommendations

Upon the basis of the foregoing findings and conclusions of law, and on the entire record in the case, I recommend that Robert S. Guernsey, B. Guerin and Ed R. Guerin, individually and as co-partners, doing business as R. J. Guernsey & Company, their agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Encouraging membership in the International Union of Operating Engineers Local Union No. 3 of the International Union of Operating Engineers, or any other labor organization of their employees.

their hire or tenure of employment or any other condition of employment;

c) In any other manner interfering with, restraining, or coercing their employees in the exercise of the right to self-organization, to join, or assist labor organizations, to bargain collectively through representatives of their own choosing, to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, and to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the

to take the following affirmative action which shall effectuate the policies of the Act:

d) Make whole Dick W. Spicher in the manner set forth in the section hereof entitled "Remedy," for any loss of pay he may have suffered as a result of Respondents' discrimination against him;

e) Upon request, make available to the National Labor Relations Board or its agents for examination and copying all pay roll records, security payment records, time cards, personnel records and reports, and all other records necessary to analyze and compute the amount of

South San Francisco, California, at the office in Cedarville, Modoc County, and at any other projects presently on them, copies of the notice attached be marked Appendix A. Copies of said be furnished by the Regional Director Twentieth Region, shall, after being by Respondents' representative, be Respondents immediately upon receipt and maintained by them for sixty (60) days thereafter in conspicuous places including all places where notices to are customarily posted. Reasonable steps be taken by Respondents to insure notices are not altered, defaced, or removed any other material;

(d) Notify the Regional Director Twentieth Region in writing within two days from the date of receipt of this Immediate Report what steps Respondents have taken to comply with the foregoing recommendations.

It is further recommended that, unless twenty (20) days from the receipt of this Immediate Report, Respondents notify said Director in writing that they will comply with foregoing recommendations, the National Relations Board issue an order requiring Respondents to take the action aforesaid.

As provided in Section 203.46 of the National Labor Relations Act, the National Labor Relations Board

1, pursuant to Section 203.45 of said Rules
ulations, file with the Board, Washington
an original and six copies of a statement
setting forth such exceptions to the Inter-
Report or to any other part of the record
ding (including rulings upon all motions
ons) as he relies upon, together with the
nd six copies of a brief in support thereof;
arty may, within the same period, file an
nd six copies of a brief in support of the
ate Report. Immediately upon the filing
atement of exceptions and/or briefs, the
g the same shall serve a copy thereof upon
e other parties. Statements of exceptions
s shall designate by precise citation the
of the record relied upon and shall be
rinted or mimeographed, and if mimeo-
hall be double spaced. Proof of service on
parties of all papers filed with the Board
omptly made as required by Section 203.85.
r provided in said Section 203.46, should
desire permission to argue orally before
request therefor must be made in writing
rd within ten (10) days from the date of
the order transferring the case to the

event no Statement of Exceptions is filed
d by the aforesaid Rules and Regulations,
gs, conclusions, recommendations, and
led order herein contained shall

ings, conclusions, and order, and all thereto shall be deemed waived for all purposes.

Dated at Washington, D. C., this 27th day of September, 1950.

/s/ EUGENE F. FREY,
Trial Examiner.

[Title of Board and Cause.]

EXCEPTIONS OF RESPONDENTS TO INTERMEDIATE REPORT OF TRIAL EXAMINER

The Respondents herewith present their objections to the Intermediate Report of the Trial Examiner in this case and rely upon the following grounds:

I.

That the Board is without jurisdiction over this case inasmuch as the respondents were not engaged in interstate commerce.

II.

That the operations of respondents did not have a substantial effect on interstate commerce and the assertion of jurisdiction by the Board would not affect the policies of the National Labor Relations Board Act.

III.

That the Associated General Contractors

was a Union joinder of such necessary

IV.

The evidence does not support the findings of the Trial Examiner.

San Francisco, California, October 11,

/s/ JOHN G. EVANS,
Attorney for Respondents.

Notice of Service by Mail attached.

Dated October 17, 1950.

United States of America Before the National
Labor Relations Board

Case No. 20-CA-274

The Matter of

S. GUERIN, RAYBURN B. GUERIN
and ED R. GUERIN, individually and as co-
partners, d/b/a R. B. GUERIN & COMPANY,
Mechanical Contractors,
and

JOSEPH SPICHER, an individual.

DECISION AND ORDER

On September 27, 1950, Trial Examiner Eugene
issued his Intermediate Report in the
aforesaid proceeding, finding that the Respond-

tive action, as set forth in the copy of the immediate Report attached hereto. There Respondents filed exceptions to the Immediate Report.

The Board¹ has reviewed the rulings of the Trial Examiner made at the hearing and finds no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Immediate Report, the exceptions, and the record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following additions and modifications:²

1. The Trial Examiner found, and we find, that the Respondents are engaged in interstate

¹Pursuant to the provisions of Section 10 of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel.

²We do not predicate our findings hereon on the evidence relating to the organization and membership of The Associated General Contractors of America (AGC) or the Respondents' connection with that organization. Therefore, we find it unnecessary to pass upon the Respondents' motion to set aside the evidence. Nor do we find merit in the Respondents' motion to dismiss the complaint because of the joinder of AGC and Operating Engineers Union No. 3 of the International Union of Marine and Shipbuilding Workers of America, herein called the Union. The complaint herein does not allege that either the Union or the Respondents have violated the Act, nor

it would effectuate the policies of the assert jurisdiction herein. The Respondents' s during the period from June 1, 1949, June 30, 1950,³ which are fully described intermediate Report, included the clearing, grading, and drainage of part of California Highway No. 28. This highway connects with State Highway No. 8A and portions of it with U. S. Highways 299 and 395. The received for this phase of the Respondents' s exceeded \$683,500. As the repair and nce of roads forming a part of an artery ree constitute services to an instrumental- mmerce, and as the services rendered by ondents exceeded \$50,000 for a 1-year he assertion of jurisdiction in this case with our recently announced jurisdictional

agree with the Trial Examiner, for the stated by him, that the Respondents dis- Dick W. Spicher on July 8, 1949, in vio- Sections 8 (a) (3) and 8 (a) (1) of the

rial Examiner erroneously stated that this tended from June 1, 1949, until June 1,

ollow Tree Lumber Company, 91 NLRB Depew Paving Co., Inc., 92 NLRB No. 36.

Upon the entire record in the case and to Section 10 (c) of the National Labor Act, the National Labor Relations Board orders that the Respondents, Robert S. Rayburn B. Guerin and Ed R. Guerin, individually and as co-partners, d/b/a R. B. Guerin & General Contractors, South San Francisco, their agents and assigns shall:

1. Cease and desist from:

(a) Encouraging membership in Operating Engineers Local Union No. 3 of the International Union of Operating Engineers, or in any labor organization of their employees, by inducing any of their employees or discriminating in any other manner in regard to their hire or employment or any term or condition of employment;

(b) In any other manner interfering with, restraining, or coercing their employees in the exercise of the right to self-organization, to form or assist labor organizations, to bargain collectively through representatives of their own choice, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of the foregoing activities, except to the extent that such right may be affected by an agreement requiring me-

or organization as a condition of employment authorized in Section 8 (a) (3) of the

make the following affirmative action, which said finds will effectuate the policies of the

Make whole Dick W. Spicher, in the manner set forth in the section of the Intermediate Report entitled "The remedy," for any loss of pay he may have suffered as a result of the Respondents' discrimination against him;

Upon request, make available to the National Labor Relations Board, or its agents, for examination and copying, all pay roll records, social security records, time cards, personnel records and all other records necessary to an analysis of the amount of back pay due under the terms of the Order;

Post at their main office in South San Francisco, at their branch office in Cedar-Rapids County, California, and at any other place presently operated by them, copies of the findings attached to the Intermediate Report and Appendix A.⁶ Copies of said notice, to be

said notice, however, shall be, and it hereby is, made by striking from line 3 thereof the words, "commendations of a Trial Examiner," and inserting in lieu thereof the words, "A Decision of the Board." In the event that this Order is enjoined by a decree of a United States Court of

furnished by the Regional Director for the
tieth Region, shall, after being duly signed by
Respondents' representative, be posted by the
spondents immediately upon receipt thereof and
maintained by them for sixty (60) consecutive days
thereafter, in conspicuous places, including all
places where notices to employees are customarily
posted. Reasonable steps shall be taken by the
spondents to insure that said notices are not
defaced, or covered by any other material;

(d) Notify the Regional Director for the
tieth Region, in writing, within ten (10) days
of the date of this Order, what steps the Re-
spondents have taken to comply herewith.

Signed at Washington, D. C.

JOHN M. HOUSTON,
Member.

ABE MURDOCK,
Member.

PAUL L. STYLES,
Member.

[Seal]

NATIONAL LABOR
RELATIONS BOARD

the National Labor Relations Board,
Twentieth Region

Case No. 20-CA-274

Matter of:

S. GUERIN, RAYBURN B. GUERIN,
R. GUERIN, Individually and as Co-part-
ners of R. B. GUERIN & COMPANY,
General Contractors,

and

SPICHER, an Individual.

Tuesday, July 18, 1950

At notice, the above-entitled matter
was heard at 10:30 o'clock, a.m.

Eugene F. Frey,
General Examiner.

Witnesses:

RY BAMFORD, ESQ.,
Pacific Building,
San Francisco, California,

Appearing on Behalf of the General
Counsel, N.L.R.B.

N G. EVANS, ESQ.,
Cobart Building,
San Francisco, California,

Trial Examiner Frey: The hearing will be in order.

* * *

The Trial Examiner conducting this hearing is Eugene F. Frey.

Now, will counsel and other representatives of the parties please state their appearance for the record.

Mr. Bamford: For the General Counsel, I am Mr. Bamford, N.L.R.B., Pacific Building, San Francisco 3, California.

Mr. Evans: John G. Evans, Attorney for the Respondents, Hobart Building, San Francisco.

* * *

Mr. Bamford: Yes. At this time I wish to offer in evidence the formal documents in this case, which I have marked for identification. They are as follows: General Counsel's 1-A, for identification, original charge, filed July 25, 1949; General Counsel's 1-B, for identification, Affidavit of Service of General Counsel's 1-A, for identification, registry receipt attached; General Counsel's 1-C, for identification, copy of First Amended Petition filed January 5, 1950; General Counsel's 1-D, for identification, Affidavit of Service of General Counsel's 1-C, for identification, with registry receipt attached; General Counsel's 1-E, for identification,

having issue April 20, 1950, by the Director; and General Counsel's 1-F, for ion, Affidavit of Service of General Coun- for identification, with registry receipts

hereupon the documents above referred to marked General Counsel's Exhibits Nos. 1-A to 1-F, inclusive, for identification.) [5*]

* * *

Examiner Frey: I am not going to rule on whether they [6] are evidentiary or not. General Counsel has stated that they are being offered as exhibits and they will be received by the Ex- aminer after the formal pleadings in the record, with exhibit numbers stated by General Counsel and they are offered them for identification.

hereupon the documents heretofore marked General Counsel's Exhibits Nos. 1-A to 1-F, inclusive, for identification, were received in evidence.) [7]

* * *

Examiner Frey: It appears to me from what has been stated by General Counsel and counsel for the Respondents that there has been some discussion between both counsel, as in most litigated cases, of the nature of pretrial conferences on the subjects of the case. The Respondents' party is represented here today by two of the

I believe that under the circumstance deny the General Counsel's motion for judgment on the pleadings and I will p Respondents to file its formal answer.

Mr. Evans: Thank you.

Trial Examiner Frey: Which I will Respondents' Exhibit No. 1.

(Whereupon the document above r was marked Respondents' Exhibit M identification.)

* * *

Mr. Bamford: Ed R. Guerin, please. an [13] adverse witness, Mr. Examiner.

ED R. GUERIN

a witness called by and on behalf of the Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Frey: Give your full address to the Reporter.

The Witness: Ed Rayburn Guerin. Th Roosevelt Avenue, Burlingame, California

* * *

Q. (By Mr. Bamford): Mr. Guerin your occupation? A. Contractor.

Q. And are you the Ed R. Guerin named in the formal document in this case as one of the

ny of Ed R. Guerin.)

y of certain fiscal transactions, relating to
med company, and ask you if you are
with this document?

es, I have seen it.

as this document prepared under your
by employees of the partnership, Mr.

A. Yes. [14]

vans: Partnership of R. B. Guerin?

amford: Yes.

By Mr. Bamford): Do you know that it
nce summarizes the transactions of R. B.
Company during the period shown on the

A. Yes.

amford: May this be marked?

* * *

Whereupon the document above referred to
marked General Counsel's Exhibit No. 2,
identification.)

By Mr. Bamford): Now, I notice that at
m of GC2 for identification there are listed
acts. The second of these, called the Modoc
ears to have been the major work per-
y the partnership during the year, is that

A. Yes.

ow can you state if the purchase figure
the top of the chart would relate principally
odoc Job?

ell. I guess that is the way it is broken

(Testimony of Ed R. Guerin.)

purchased by you for the Modoc Job, Mr.

A. Well, it would involve equipment and rentals. I believe the rentals are involved in the rentals of [15] equipment.

* * *

Mr. Bamford: General Counsel's 2nd explanation is offered in evidence. [16]

* * *

Trial Examiner Frey: Just a moment more, point. I take [17] there is no dispute between you and counsel on the basis of what the witness has testified about this sheet, that the figures are substantially correct?

Mr. Evans: Yes. There would be this involved there. Let me say this for the record: As requested by Mr. Bamford—I believe it was a telephone conversation—and in our original discussion had with him on July 12th, the following day he telephoned me to say that we couldn't prepare some summary of our operations; that is, to show our purchases and sales, purchases, the amount that was made in California, and the amount that would be made out of California, and to give our rental breakdown for the job information, and to show under the job information the nature of the job, where it was located, the type of work, the amount of work on the tract, and whether we were general or sub-

ny of Ed R. Guerin.)

at time I stated to Mr. Bamford, that the
so limited that it would be impossible for
through our records before this hearing
out all of our purchase invoices and rental
ons and give a complete and accurate pic-
those transactions within the limited period
nd it was agreed that we would go through
e this summary to the best of our ability,
the understanding that neither side would
it to be absolutely correct, but only that
represent our best effort to present at this
correct picture for the [18] Trial Examiner's
tion.

a correct statement, Mr. Bamford.

mford: That is correct, Mr. Evans.

Examiner Frey: That brings me back to
al question: Are counsel agreed that the
here are substantially correct; that is, not
the last penny or the last dollar, but sub-
correct for the month and for the job set
e?

Evans: Well, to answer the Examiner's
on that——

Examiner Frey: I am not trying to ask
Evans, to say whether it is 90 per cent
80 per cent correct, but they are correct
tent that your client was able to get the
gures within the limited time afforded, is

(Testimony of Ed R. Guern.)
our transactions as indicated, but owing to
and inability of insufficient time, there n
mistake in one direction or another. But
that our best efforts and good faith were
produce that and we feel that that should
tially reflect our operating conditions.

Was that your understanding, Mr. Bam
Mr. Bamford: Correct, Mr. Evans.

Trial Examiner Frey: On that basis I v
rule the [19] objection of respondents to
mission of the document and admit it as
Counsel's Exhibit No. 2.

(Thereupon the document marked
Counsel's Exhibit No 2, in identificat
received in evidence.)

* * *

GENERAL COUNSEL'S EXHIBIT No. 2

List of Purchases From June 1, 1949, to and Including June 30, 1950

	Gross Purchases	California Purchases	Out of State Purchases
e, 1949, V25	\$ 88,086.92	\$ 77,508.75	\$ 1,209.17
y, 1949, V28	48,544.34	40,959.15	5,010.19
rust, 1949, V27	51,014.59	43,621.68	5,393.78
tember, 1949, V33	55,733.47	31,452.30	4,709.89
ober, 1949, V35	70,778.46	36,829.86	2,811.17
ember, 1949, V38A	70,459.37	23,011.02	450.96
ember, 1949, V39	87,367.04	17,144.47	(2,124.45)
uary, 1950, V43	7,254.71	4,981.28	(6.50)
bruary, 1950, V44A	42,790.00	17,531.94	.....
ch, 1950, V46	21,184.93	13,657.20	83.69
il, 1950, V48	24,593.62	23,234.57	603.50
, 1950, V51	29,794.13	16,980.14	206.21
e, 1950, V54	30,680.98	12,575.83	417.60
.....	<u>\$629,282.56</u>	<u>\$359,488.19</u>	<u>\$18,765.21</u>

Cash Purchases From June 1, 1949, to and Including June 30, 1950

e, 1949	\$ 509.42	\$ 509.42	.....
r, 1949	29.00	29.00	.....
rust, 1949	784.92	784.92	.....
ember, 1949	1,166.03	1,166.03	.....
ber, 1949	1,671.11	1,671.11	.....
ember, 1949	309.47	309.47	.....
ember, 1949	521.66	521.66	.....
uary, 1950	none	none	.....
bruary, 1950	none	none	.....
ch, 1950	152.52	152.52	.....
l, 1950	32.48	28.70	\$3.78
, 1950	none	none	.....
e, 1950	25.88	21.15	4.73
.....	<u>\$5,202.49</u>	<u>\$5,193.98</u>	<u>\$8.51</u>

	For Whom	Location	Gen. or Sub.	Nature
	So. San Francisco Land & Improvement	So. San Francisco	General	Filling and Developi
	Calif. Dept. of Public Works	Alturas-Cedarville	General	State Highway
	So. San Francisco Land & Improvement	So. San Francisco	General	Filling and Developi
J''	San Francisco, California	San Francisco	Sub	Excavating and Back
'K''	San Francisco Bridge Co.	So. San Francisco	General	Filling

3, 1950.

y of Ed R. Guerin.)

Mr. Bamford): Mr. Guerin, to return
art, apart from equipment rentals, what
principal items represented in the "gross
' figures?

* * *

ll, there would be cement, reinforcing
ugated [20] pipe. There will be gasoline,
, motor oils. There would be purchases of
quipment—pickups, trucks, tractors.

xaminer Frey: You are referring now to
representing the Modoc Job?

ness: Yes, but that is including rentals.

xaminer Frey: All right. Proceed.

ntinuing): But I think, generally, if I
e brief it, it is the general run of any
I don't believe labor is included in there,
a substantial amount, but it is ordinary
There have been tire purchases, natur-
g bits, rooter points, I suppose stationery,
stuff like that.

mford: I was referring to the printed
ch would be steel and concrete, apart
pment rentals? A. Yes.

ere do you procure your steel from?

l, I think, yes, the Bethlehem Steel in
Francisco, fabricated that.

your concrete?

cement was manufactured at Los Gatos,
and the concrete aggregate material was

(Testimony of Ed R. Guerin.)

Q. That is what I was getting at. That

A. There was corrugated pipe, I believe mentioned, in the [21] general run of the pipe

Q. Where do you procure that?

A. That is the Consolidated Western Steel Corporation, in South San Francisco. The diesel fuel and gasoline, which was a substantial amount, was all California products, and the oils, greases and so forth.

* * *

Q. (By Mr. Bamford): Now, did you purchase outright any equipment during this period?
Guerin? A. Oh, yes.

* * *

Q. Well, both the Modoc Job and the smaller jobs listed here, did you purchase equipment outright during this period?

A. Yes, we have purchased quite a few pieces and trucks. [22]

Q. Light equipment? A. Yes.

Q. Where did you procure them?

A. All in the State of California. I think there was some bought locally there in Alturas, there was some bought in Sacramento, and I think some bought in South San Francisco.

Q. What makes did you purchase, do you

A. Well, I think we got five or six GMC trucks and I think there are two or three International

by of Ed R. Guerin.)

equipment that you purchased outright
is period of time?

would say \$50,000 or \$60,000.

w, with respect to equipment rentals, could
in just what that expression signifies?

ell, we would rent heavy equipment from
rces. One big account we had, was a
aterpillar dealer in Los Angeles, and then
l from individuals. One outfit, I believe
es were in Eureka, California, but their
t happened to be in Redding, which was
se to the job.

w, was the bulk of the equipment rental
a transaction under which you had the
buy the equipment, Mr. Guerin? [23]

ell, I wouldn't say the bulk of it. Well,
would be a little bit over half.

l you exercise those options?

, we haven't.

ve they lapsed? A. Oh, yes.

w, could you approximate what the total
uld be of the equipment which you rented
e period from June to June, 1949 to 1950?

ell, I would say that it would be around

d that was all——

resume now. Let me qualify that?

s.

other words, I presume a lot of that

(Testimony of Ed R. Guerin.)

would be at the time that it was on the job being used.

Q. Was some of it new, when it was delivered to you?

A. Yes, some of it was. I would say out of about 20 or 25 pieces were new and delivered on the job new.

Q. Representing about a third or a fourth total of value of the equipment?

A. Well, let's see.

Mr. Evans: I think that the answer is itself, six [24] pieces out of 20 or 25, the price I think. That is in the record, isn't it?

The Witness: Well, you understand, it is something new—now, I will make a comparison with one new "cat," equipped with all the things and bulldozers, is around \$19,000. I am able to get a similar "cat" for \$6,000 or 7 years ago, depending upon the condition.

Q. (By Mr. Bamford): So that the value of the new equipment that you rent would be greater in proportion than the dollar value of the older equipment?

A. Just as I said, about a third.

Q. Even though the rental would be approximately the same?

A. I would say about a third.

Q. Well, could you say that of the \$200,000 that the new equipment which

any of Ed R. Guerin.)

Well, it might. Between \$100,000 and \$150,-
ould say.

Well, now, did the majority of that equip-
ne originally from outside the State of Cali-
Mr. Guerin?

vans: Which equipment?

Bamford: All of the equipment now. The

Well, now, I am not familiar with what goes
pickup truck. I believe they are assembled
re in California. What percentage is actu-
manufactured here I wouldn't [25] actually be
state. But, with caterpillars, I don't know
ny have a little "SP" on the end of the
mber, and that means San Leandro, which
s the Bay, and "Peoria," but what per-
of one "cat," we will say, is made in Cali-
nd the other percentage in Peoria, I don't
d I don't know how many have that serial
that we had on the job that had the "SP"

By Mr. Bamford): Well, of the new equip-
t was furnished you, could you tell there
e origin had come?

Well, I could say definitely it came from

ne majority of the new equipment came
oria?

es, but there are parts of that equipment

(Testimony of Ed R. Guerin.)

goes back to Peoria and then it is finally there.

Trial Examiner Frey: When you say you mean Peoria, Illinois.

The Witness: Peoria, Illinois.

* * *

Q. (By Mr. Bamford): What California number did this highway job bear?

A. It is District Two, Route 28, Section

Q. How long is the project on which working? [26]

A. It is 8.104 miles.

Trial Examiner Frey: Was your section project built between Tom's Creek and C

The Witness: That is right.

Trial Examiner Frey: In Modoc Cou

The Witness: Yes.

Trial Examiner Frey: All right. Proce

Q. (By Mr. Bamford): Now, does join U. S. 395 at some point in California branch road off U. S. 395, isn't it?

A. I believe it is.

Q. And doesn't it run into Nevada, E

A. Yes. You can go into Nevada by this road.

Trial Examiner Frey: When was your this project completed?

The Witness: It isn't completed yet.

Trial Examiner Frey: Not completed

ny of Ed R. Guerin.)

Witness: No.

Examiner Frey: Does it appear on any State Highway Map that you know of in a line or by some other indication, indicating an incompleated part of the road?

Witness: Yes, it will show an incompleated on the end of our job on to, over to where on to the State of Nevada. It is Route

* * *

Cross-Examination

Evans: [30]

* * *

amford: No further questions of this wit-

Examiner Frey: Just a moment. I have

you describe in general terms how much construction of State Highway No. 28 you are putting out under the Modoc Job?

Witness: I believe it would be 90 per cent.

Examiner Frey: I mean in terms of what the highway you are building. [32]

Witness: Well, we are doing the clearing right-of-way, the grading, which is about 90 per cent of the entire job in dollars and cents, and drainage, and a very little concrete. I guess about all. We are not doing any other

The Examiner Fry: Will the paving be done by another contractor?

The Witness: Yes, sir.

The Examiner Fry: How wide a highway is it?

The Witness: Well, it is a standard two-lane highway. It is about 30 or 40 feet wide. It will be around 36 to 40 feet wide. [33]

A.

Q.

The Examiner Fry: This is at my request. I am getting information for my own purposes; since I am not of the fact and I have got to get all the facts together for the benefit of the Board.

The Witness: It might be helpful if the record would show whether his construction was part of the system of that highway to others in the area. Why I looked for any official map or map which might show these figures.

The Witness: I saw the small map from the State of California. This is a map from the State of California, Department of Public Works, Division of Highways. District 2 includes Modesto.

The Witness: State Highway No. 28 runs through the area.

Q. (1) join U. S. branch

A.

Q.

The Examiner Fry: Will you resume the stand? [51]

The Witness: Yes, sir.

The Examiner Fry: The hearing was resumed, pursuant to the order of the court.

The Witness: Yes, sir.

The Examiner Fry: The hearing was resumed, pursuant to the order of the court.

The Witness: Yes, sir.

The Examiner Fry: The hearing was resumed, pursuant to the order of the court.

order.

All right, proceed, Mr. Bamford.

Mr. Evans: You are reopening your case on the question of jurisdiction?

Mr. Bamford: No. I am merely answering the Trial Examiner's request and am now in possession of two maps, one furnished by the Triple A, the other furnished by the State of California, Department of Public Works, Division of Highways.

Mr. Evans: Is this going in under your theory jurisdiction?

Trial Examiner Frey: This is at my request. I got the information for my own purposes; since I am the trier of the facts and I have got to get all pertinent facts together for the benefit of the jury. I feel that it might be helpful if the record shows what highway this construction was on and the relation of that highway to others in the area. That is why I asked for any official or semi-official map which might show those

A.

Now, may I see the small map from the State of California? This is a map from the State of California, Department of Public Works, Division of Highways, District 2. District 2 includes Modoc County, through which State Highway No. 28 runs.

Mr. Guerin, would you resume the stand? [51-A]

(Testimony of Ed R. Guerin.)

Trial Examiner Frey: Will the paving be by another contractor?

The Witness: Yes, sir.

Trial Examiner Frey: How wide a highway is this?

The Witness: Well, it is a standard highway. It is about 30 or 40 feet wide. The average around 36 to 40 feet wide. [33]

* * *

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Now, may I see the small map from the State of California? This is a map from the State of California, Department of Public Works, Division of Highways, District 2. District 2 includes Santa Clara County, through which State Highway No. 100 runs.

Mr. Guerin, would you resume the stand?

After Recess

(Whereupon, the hearing was resumed pursuant to the taking of the recess, at 3:30 p.m.)

Examiner Frey: The hearing will come to

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Evans: You are reopening your case on the
n of jurisdiction?

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Trial E:
by another
The Wi
Trial F
this?

The W
highway
average

Trial
want th
am the
pertine
I feel
show
and th
area.
semi-

No
Calif
form
Hig
Co

der.
All right, proceed.
Mr. Evans: Yes.
question of jurisdiction.
Mr. Bamford: No.
Trial Examiner's report.
two maps, one
her furnished by the
ent of Public Works.
Mr. Evans: Is the
jurisdiction?
Trial Examiner?
get the information
the trial of the
the pertinent facts.
ard I feel that
ould show what
rt of and the
the area. The
ap or semi-
ures.
Now, map
California?
nia, D
ghway
ounty
Mr.

b the [52] map comprising
isn't it?
hat
s. isn't it?
es.
Frey Well, the Trial Examiner,
this map, will receive it in evi-
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* * *

ED R. GUERIN

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Redirect examination

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Mr. Bamford: Mr. Guerin, in July,

B. Guerin and Company requiring that
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Engineers Local 3?

* * *

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Cross-Examination
(Continued)

Trial Examiner Frey: Since the Trial Examiner asked for this information, I will ask Mr. Evans some questions based on this map.

Trial Examiner Frey: I show you the map produced for the Trial Examiner by the Counsel, and ask you to indicate by pencil mark on it, as closely as you can, what part of Highway in Modoc County is being constructed by you. You can indicate it by a cut mark across the highway. Two cut marks across the highway.

Mr. Evans: Mr. Examiner, do you wish that first introduced?

Trial Examiner Frey: Well, after it is marked, we will make it an Examiner's Exhibit.

All right, will you mark the map?

The Witness: Well, our job goes within one mile of Cedarville, I'd say about there. It comes back to, well, about here, I'd say. It's pretty small scale there.

Trial Examiner Frey: All right. Are the parties agreed that this map on the scale indicated is substantially accurate?

Mr. Evans: On the scale as shown there

mony of Ed R. Guerin.)

to be covered by the [52] map comprising
2.

Evans: It is, isn't it?

Witness: What?

Evans: It is, isn't it?

Witness: Yes.

Examiner Frey: Well, the Trial Examiner,
s called for this map, will receive it in evi-
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ED R. GUERIN

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ng Engineers Local 3?

* * *

(Testimony of Ed R. Guerin.)

and it was up to the delegate—if a man go into the Union, if he wished to go in to clear him and I suppose through some arrangement that I don't know anything about—maybe a permit deal or maybe it was signing up a member of the Union, but we as contractors care whether they belonged to the Union. We always hire all the localities that we have account of living conditions. It was a time of the country, housing was scarce and we were lucky—that is, within reason—if a man was competent to hire local fellows.

* * *

Q. (By Mr. Bamford): Mr. Guerin, I have what purports to be a letter from R. B. Guerin Company to the National Labor Relations Board dated July 28, 1949. Can you identify this letter, sir?

A. Yes, I signed it.

Q. This is a letter which was sent by your company to us? [61]

A. Yes.

Mr. Bamford: May it be marked, please, General Counsel's Exhibit next in order?

* * *

(Thereupon the document above referred to was marked General Counsel's Exhibit for identification.)

* * *

Q. (By Mr. Bamford): Mr. Guerin,

by of Ed R. Guerin.)

l paragraph of that letter. Will you read
se?

urthermore"—is that it?

, sir.

—it is our understanding that we must
nion members in good standing or those
become affiliated with a Union or else
Unions pull their members off the project.”
ht. [62]

* * *

y Mr. Bamford): Now, how do you square
your statement that you weren't requiring
employees to be approved by the Union?
was up to the Union delegate to sign them
ve them permits or ask them to join the
nch happened in many cases up there.
ening right now up there.

ll, was it your policy if the Union refused
new employee that you would then refuse
n or keep him on your pay roll?

was agreed when we went on the job that
d clear anyone that was competent enough
a job up there. I am talking about car-
'catskinners or shovel crews or grease-
or mechanics—any of the crafts that we
ve to accomplish the job.

ll, on your part was it your agreement
would employ only those who were cleared

(Testimony of Ed R. Guerin.)

pull their regular members off? We had and fifty, two hundred people up there.

Q. Was this policy made known through operation to your supervisors?

A. Absolutely.

Q. Was the policy known to Lloyd Ma master mechanic? [63]

* * *

Q. But what I am trying to get at, M is was it your policy and the policy of the that if the Union wouldn't clear a man would not hire him or not keep him in ployment?

A. No, that was not the

Q. Again I direct your attention to this

A. I didn't write the letter, although it. I don't believe that was our general cause it didn't prove out that way. We starting the job along about that time.

Q. Did you read the letter before you Mr. Guerin?

A. I probably glanced through it. I it more now than I did when I signed it.

Q. Who did write the letter?

A. Our bookkeeper, George Perry.

Trial Examiner Frey: Who gave him to write it?

The Witness: Well, I think there was of a citation came in and it was all written

by of Ed R. Guerin.)

don't see anything wrong with it. We
r contract up there, have a penalty for
n and everything else and Number One
e good help and plenty of help and [65]
with anybody, Unions or anybody else.

y Mr. Bamford): How long have you
e contracting business?

out 40 years. I will admit too long.

rior to 1949 had you, in the contracting
ever done business with the Operating En-

ny, I remember them before they were ever
My oldest boy is a charter member of No.

* * *

asn't it the usual arrangement between
he Operating Engineers that if you hired
n not through the Union but on your own
man would join the Operating Engineers?
s, ultimately. They were tickled to death
t.

Examiner Frey: Did you ask them to or
m to join under your old hiring and train-
ices?

itness: No, we didn't care whether they
not, but what are you going to do, Mr.
e, when just for the sake of one individual
a hundred men will walk off the job. That
pleasant too, you know. You can't swim

(Testimony of Ed R. Guerin.)

Union; but it wasn't any of our business. I have never heard of a case where they had an opportunity to go in the Union and never heard of any case where they weren't to go in, so that would relieve us of any beef on it.

* * *

Q. Wasn't it the understanding up there at the Cedarville job, Mr. Guerin, that all the heating mechanics had to belong to the Operating Engineers or else get cleared by them?

A. Get cleared, I will go for that, yes.

Trial Examiner Frey: What would you have done if some weren't cleared,

The Witness: Well, by gosh, I never heard of anybody that they wouldn't clear, the ironworkers and we had no occasion to ever run anybody by my knowledge.

Trial Examiner Frey: You just said that it was your business you can't swim upstream and you can't afford to get in trouble with anybody, meaning the Operating Engineers Union. What trouble are you referring to? Referring to their refusal to clear a man?

The Witness: I don't remember of them refusing them.

Trial Examiner Frey: What did you mean by that [67] statement you just made?

The Witness: Well, I believe he asked

Trial Examiner Frey: Now, wait. I

by of Ed R. Guerin.)

which the witness said, "In this business you
up stream," and read that answer back
ness.

answer read.)

Examiner Frey: Now, what did you mean
answer?

Witness: You mean swimming upstream?

Examiner Frey: No, no. The previous
that, in that answer. Read them to him

answer read.)

Examiner Frey: What did you mean by
ment?

Witness: I meant this: In other words, I
came about through asking me questions
long I had been in the business, in the
g business, and I said I was in before the
t really heavy, and I believe in the last
ar they came in very much to prominence,
ally all of our jobs—we would like to have
long peacefully and finish them on time,
s why I meant we couldn't swim upstream.
o go along with the trend.

Examiner Frey: You mean you had to do
Unions wanted?

Witness: Pretty near.

Examiner Frey: Does that mean, then,
were [68] afraid that if one individual

(Testimony of Ed R. Guerin.)

The Witness: Well, that is possible.

Trial Examiner Frey: Well, is that meant by that statement there?

The Witness: Yes, I will say that is meant, yes.

Trial Examiner Frey: All right. Proceed.

Q. (By Mr. Bamford): You testified, that this policy was known up on the job, the heavy duty mechanics had to be with the Engineers?

A. I believe there was times there was a hundred per cent; everybody was Union, laborers.

Q. I am asking what your policy was, many members there were up there. Wasn't that policy up there that everybody, all of you heavy duty mechanics and your operators, too, had to be organized with Local 3?

A. Well, sure.

Q. And that policy was made known to the supervisors, is that correct?

A. Certainly. They were all Union men.

Q. And your master mechanic, Lloyd, was a supervisor?

A. That is correct.

Trial Examiner Frey: Was he a Union man?

The Witness: Yes.

Mr. Bamford: No further questions—
one more thing. Since this has been discussed at length, I should like [69] to offer GC 6 f.

ly of Ed R. Guerin.)

Examiner Frey: The objections are over-
the letter marked as GC 6 for identifica-
be admitted in evidence with the same

ne document heretofore marked General
sel's Exhibit No. 6 for identification was
red in evidence.)

GENERAL COUNSEL'S EXHIBIT No. 6

R. B. Guerin & Co.

and E. R. Guerin

General Contractors

P. O. Box 201

South San Francisco, California

July 28, 1949

ates of America,

Labor Relations Board,

on,

cisco, California.

Subject: Complaint—R. W. Spicher

a:

in receipt of your complaint filed by R. W.

resident of 1503 Austin St., Klamath

gon and beg to inform you that the state-

le by Mr. Spicher are erroneous and with-

ation as far as the liability of this com-

(Testimony of Ed R. Guerin.)

mechanic nor by any partner of the company. The company was informed personally by the business representative of Local No. 3, Operating Engineers of Redding that he could not work on the project unless he was reinstated as a member in good standing. We were likely misled by this representative that we could not employ a man on the job in violation of our contract as agreed by the Associated General Contractors of America, Incorporated, of which we are a member. This Association represents all contractors in the area and negotiates all contracts with the Labor Union representing all types of crafts. Furthermore, we have a full understanding that we must employ union members in good standing or those willing to become members with a union or else have the unions remove our members off the project.

We wish to further state that, "no union rule practice was committed by the employer through the assistance of the union" as you state in your report of pertinent facts. We reiterate that the business representative for the Operating Engineers is not responsible for this man's removal from the project.

It is felt that the demands made by the union for the re-instatement of Mr. Spicher is the personal responsibility of the Operating Engineers in its own right and no concern of this company.

As general contractors we are not engaged in the International Commerce and do not come under the

ny of Ed R. Guerin.)

e a complaint against this firm instead of
er party involved, the union, who is re-
for his having been terminated.

Very truly yours,

/s/ E. R. GUERIN.

[n]: G.C:6.

7/18/50.

GUERIN.

d Aug. 1, 1949, N.L.R.B.

ed July 18, 1950.

* * *

Redirect Examination

amford:

l Mr. Martin have power to discharge em-

A. Yes.

* * *

a witness called by and on behalf of the Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Frey: Give the report your full name and address.

The Witness: Dick Spicher, 1503 Austine, Klamath Falls, Oregon.

Q. (By Mr. Bamford): Mr. Spicher, have you ever been employed by [72] R. B. Guerin and Company?

A. Yes.

Q. Are you employed there now?

Q. When did you first go to work for R. B. Guerin and Company?

A. Sometime in July of '49.

Q. Did you apply for the job with Guerin and Company?

A. No.

Q. How did you first hear of the job at Klamath Falls?

A. Well, there was a fellow that had been on this job, that used to live in the Falls. His name was [redacted], but he called my wife, referring to the job; wanted me to come on this job at Klamath Falls. Well, at the time I was working at Madras for the Warm Springs Lumber Company, so I had to call and find out the whole details, all about it. So she found out and then they called me. I quit up there and came down on the [redacted] job.

y of Dick W. Spicher.)

I went to Cedarville, speak to this fellow
your wife?

. He called me the night that I got home
aras and then the next morning this fellow
Guerin office in Cedarville called me and
know if I could get down there right
re was a need of me, and I told him it
probably around noon the following day.
t a minute. In this conversation with the
m [73] Guerin's office, was there anything
c Unions or clearance with Unions?

. I asked him about getting cleared with
and he said I was already cleared. He
me on down and go to work."

Q Did you go down then? A. I did.

Q Did you work that day?

Q Was not the day I got there.

Q Did you work the next day?

Q The next day I went to work—that morning.

Q What was your job there?

Q Heavy duty mechanic.

Q What was your rate of pay?

Q \$21½.

Q Did you say you worked the next day after you

Q For work? A. Yes, sir.

Q Who was your supervisor?

Q Syd Martin. [74]

(Testimony of Dick W. Spicher.)

A. No. I reported next morning to the master mechanic, Lloyd Martin, I wanted me to come back on the evening shift.

Q. Did you come back at 3:30?

A. I came back for the evening shift.

Q. Did you work that evening shift?

A. No.

Q. How did that happen?

A. The Business Agent from the U there——

Q. Just a minute. Do you know the Agent's name?

A. I believe it was Archibald, the na Business Agent.

Q. Had you met him before? A.

Q. Did he introduce himself? A.

Q. What Union was that, Mr. Spiche

A. It was Local 3.

A. The Operating Engineers? A.

Q. Did you have a conversation with M bald, if that [75] was his name?

A. Yes, a short one.

* * *

Q. (By Mr. Bamford): Now, where conversation take place?

A. It took place just outside the shop d in Cedarville.

Q. Was anyone else present within e

by of Dick W. Spicher.)

Well, Lloyd Martin was inside there.

Before the conversation ended between you and Archibald, did Martin join the conversation?

Yes, he just came up——

Did he come within earshot during the conversation?

A. Come where?

Did he come within earshot while you were talking with Archibald?

Yes, I will say he was. [76]

Will you tell me what was said and by whom in this conversation, please? [77]

* * *

Witness: Archibald came up and said to me, "If I had my book and clearance and I said, 'I will have my book with me and they cleared me out of the office here.'"

(By Mr. Bamford): What did Archibald

Archibald asked Lloyd Martin there if he had clearance.

Did Martin come up after that conversation?

Right then he came up and Martin says, "Well, and he stood there awhile and Archibald says, 'There is nothing I can do for you, then,'"

He says he had men down there in the Local Union for a job to take my place, so I asked him if they wanted me to work that night and he says, "Can you get along without him?"

(Testimony of Dick W. Spicher.)
said, "Well," he said, "I guess I can't then," so they got in their car and went the road. I don't know where they went

Q. At that point did your employment with R. B. Guerin? A. Yes.

Q. Did you leave their premises?

A. Yes. [79]

Q. And you didn't work that night?

A. Didn't work that night.

Mr. Bamford: Mr. Examiner, for the of establishing dates, Counsel are prepared late that the day that Mr. Spicher worked 7 and the day he was terminated was Jul

Trial Examiner Frey: The record will

Mr. Evans: So stipulated.

* * *

Cross-Examination

By Mr. Evans:

Q. Well, you tell us, Mr. Spicher, that called up your wife that had a couple of job and told her there was a job over the

A. Yes.

Q. Do you know if he said he was con any way with Guerin Brothers or R. E Company?

A. He had two cats on the job, yes.

Q. What capacity, did he tell you?

A. I believe it was clearing

by of Dick W. Spicher.)

w, I wouldn't say.

ll, the fact of the matter is the man's

Murien, [80] wasn't it?

believe it was.

at's right, and he was a sub-contractor on

o there with a man by the name of Cox?

s.

nning a couple of cats?

ll, I don't know if his name was Cox. I

had a couple of cats.

ll, Murien was the man that talked to your

believe that was his name, Murien.

en you got on the job you found out he

-contractor for Guerin, didn't you?

on't know if I found out he was a sub-

or not. There was nothing ever said to

that.

at did you see him doing when you got

?

* * *

tness: He was there in the shop—— [81]

* * *

xaminer Frey: Read it back to him, what
to say.

uestion and answer read.)

tness: That's right, he was there in the

I got there

(Testimony of Dick W. Spicher.)

A. No.

Q. Had you known Mr. Murien before
out there on that job? A. No.

Q. Do you know why he would have
up regarding this work?

A. From a friend that he knew the
Falls that used to work with me at C. A.
contractor there in the Falls.

Q. In other words, you didn't know
all? A. No, I didn't.

Q. And some friend of his knew about
and called him? A. Yes.

Q. And he in turn called you?

A. Yes. [82]

* * *

Q. Did you ever talk to Murien him-
your wife do all the conversing? A.

Q. When you conversed with Murien,
did he not tell you that this job was off
friend of his and he suggested you go
apply for it? A. No.

Q. He didn't tell you that? A.

Q. Now, you tell us that after you
Murien and asked him about the condi-
the salary and so forth out there some
Guerin's office called you? A. That

Q. Do you remember what that ma-
was? [83] A. No.

Q. Did he tell you what his position

ny of Dick W. Spicher.)

ell, he was in the office when he handed
ard to sign when I first went in there.

* * *

u say he telephoned to you, is that correct?
at was the morning I went down there. He
d me and that was the same guy that
ne this card at the Guerin office at Cedar-
had me sign it.

d he tell you he was the man who had tele-
ou? A. Yes.

you have that card he gave you?

, they kept the card.

you don't know what that man's name

A. No.

as it any of the Guerins; there is Mr. Rob-
erin, sitting here, Mr. E. R. Guerin, who
or Mr. Martin? A. Neither one.

you don't know who he was?

d what did you——

Examiner Frey: Do you know what he
the card after you signed it?

itness: Put it back in his file with the
e [84] cards. All he done——

Examiner Frey: Did you see him put it in

itness: Yes. All he done was hand it to
ned it and he put it back in the file.

(Testimony of Dick W. Spicher.)
you introduce yourself to this man or how
make yourself known to him?

A. I introduced myself to him.

Q. And you told him you were Spicher.

A. Yes.

Q. Did you tell him you were a heavy
mechanic? A. I did.

Q. And you were a heavy duty mechanic
time? A. Yes.

Q. And you had experience before in
that type? A. I had.

Q. With cats and jeeps?

A. Cats and shovels and all.

Q. And with jeeps? A. Yes, jeeps.

Q. Well, about how much experience
had at the time you applied for this work?

A. Well, around approximately 16 years.

Q. About 16 years; can you give us some
where that [85] experience was gained,
employers?

A. Well, there is six and a half years
Dunn, a contractor in Klamath Falls; then
years at General Motors at Klamath Falls
Corporation, General Motors dealer; and
year and a half in at Morris and Knutson
don't know just how much time at Butler
tion out at Spokane.

Q. Well, now, let us go back to when
with Dunn. What were your specific duties

by of Dick W. Spicher.)

heavy duty mechanic. The last year there I
er mechanic, the last two years.

and what type of operation did he have,
k did he do?

Well, the last two years we were building
down here in California at Weitchpec,
River.

Building a bridge? A. Yes.

Now, in those operations how many cats were
you remember?

Well, himself, he had only eight; then there
were several rented.

And you were in charge of the repairing of
ment?

repairing—not all the time that I was in
D.

Examiner Frey: This is on the Dunn job?

Witness: Yes.

Examiner Frey: At the bridge? [86]

Witness: Yes. Well, on the bridge job I was
of all of it, yes.

by Mr. Evans): And you say he had eight
ne? A. Yes.

and rented others? A. Yes.

and you were in charge of the repair work
A. Yes.

Now, what type of cats were those—Cater-

A. They were all cats. [87]

(Testimony of Dick W. Spicher.)

Q. And they told you to come back morning and go to work? A. Yes.

* * *

Q. Or about a clearance either?

Q. So he said, "Come back and work shift"? And when you went back to work shift you found Mr. Archibald, I believe fired, from the Union there?

A. That's right.

Q. And now, you related in substance conversation that [90] was held between you and Mr. Archibald at that time in your direct testimony? A. Yes.

Q. Well, how did you know Mr. Archibald? How did he know you at that time? Did he introduce himself to you or did he introduce you to him?

A. He introduced himself to me and I introduced myself to him.

Q. You walked right up and saw this man and knew that was Mr. Archibald?

Q. How did you know him?

A. He introduced himself as a Business Representative, as Archibald.

Q. Did he say he knew you?

A. No, he didn't know me.

Q. How did he know that you were S.

A. I told him my name. Then he asked

by of Dick W. Spicher.)

no else was standing there when you first
Mr. Archibald? A. Lloyd Martin.

and Mr. Martin introduce you to him?

Well, I wouldn't say that he did. I don't
know at that time whether he did or not. [91]

Well, then let me ask you this: Who spoke
to Mr. Archibald? A. Archibald.

What did he say?

Well, the first thing he asked me my name,
and then he introduced himself as Archi-
bald and he introduced him-
self to me. Archibald.

Was Mr. Martin standing there?

Mr. Martin wasn't right there at the minute, no.

Right. Well, now, when he said, "I am

Archibald," and asked you your name, what did he

say to you and what did you say to him? I

remember to have the conversation just as it was.

He asked me if I had my Union book and

asked for this job and I said, "I don't have no

book with me," and I said, "They cleared

out of the office here."

What did he say to you?

Well, he asked Lloyd Martin if he knowed it.

Well, had Martin come back in in the mean-

A. Martin came up about that time.

He asked Martin if he "knowed" it, and

that was said by Mr. Archibald to you and

and said by you to Mr. Archibald?

(Testimony of Dick W. Spicher.)

Q. Just that is all he said? [92]

A. That's right.

Q. When you said you didn't have a
you had been cleared through the office
said to you he can't do anything for you?

A. He said, "I can't do anything for
said, "I got men at the Local waiting for
job."

* * *

Trial Examiner Frey: What are the d
heavy duty mechanic?

The Witness: Well, all major overhaul
pairs.

Trial Examiner Frey: On what?

The Witness: On all types.

Trial Examiner Frey: Of what?

The Witness: Cats, shovels, trucks and

Trial Examiner Frey: Have you perfo
work on all those types of equipment d
sixteen years of your experience?

The Witness: No, not on all types, no

Trial Examiner Frey: Well, have
formed the heavy duty mechanic work on
type during the sixteen years?

The Witness: Well, yes.

Trial Examiner Frey: Which one?

The Witness: On the cats, overhauled
overhauled the feed-link-belt-shovels, grad

Trial Examiner Frey: You have done

ty of Dick W. Spicher.)

itness: Yes.

Examiner Frey: And in that overhaul
t parts of the equipment do you work on?

itness: In the overhaul work?

Examiner Frey: Any overhaul work.

itness: Well, final drives, transmissions,
[124] motors.

Examiner Frey: Do you have to have any
nowledge in overhauling a transmission,
upon how many forward and reverse
t a transmission has?

itness: Well, I suppose so, but you most
get a book to go by there, on tearing it
putting it together. I wouldn't say you
e to have too much knowledge.

Examiner Frey: I suppose you had a
r tractor which had a transmission some-
an ordinary automobile transmission, with
forward speeds and one reverse, and you
to tear down and repair and overhaul that
on. Would you have to have any more
nowledge or any special training in order
wn a transmission on a D7 tractor which
orward speeds and four reverses?

itness: No, not if I tore it down, you

Examiner Frey: How about repair and
n of replacement parts in it?

itness: How about what?

(Testimony of Dick W. Spicher.)
place any parts in a transmission on a
than you would have to have in an ordin
speed forward and one-speed reverse tran

The Witness: Yes, you would have
little. [125]

Trial Examiner Frey: You say that
three working years, three years working
General Motors dealer?

The Witness: General Motors.

Trial Examiner Frey: What was the
that dealer?

The Witness: West Hitchcock. I put
myself in that, eighteen months.

Trial Examiner Frey: On what work?

The Witness: Major motor overhauls

Trial Examiner Frey: You mean
Motors diesel tractors?

The Witness: Motors, yes.

Trial Examiner Frey: And the other
a half you worked where?

The Witness: I worked for myself.

Trial Examiner Frey: Doing the same

The Witness: Doing the same work.

Trial Examiner Frey: During that th
did you work on just diesel tractors?

The Witness: No, no.

Trial Examiner Frey: On what else?

The Witness: On cars and trucks, ri
with the rest of it

y of Dick W. Spicher.)

uring the year and a half with Morrison—
ne other name?

itness: Knudsen. [126]

xaminer Frey: Morrison-Knudsen.

itness: Working on trucks, cats and
epairing them.

xaminer Frey: How about your work for
onstruction Company?

itness: Well, working on trucks, and so
as the same thing.

xaminer Frey: How long did you work
?

itness: I don't know just how long I did
Butler Construction.

xaminer Frey: Was that after Morrison-
?

itness: Yes. [127]

* * *

xaminer Frey: General Counsel rests?

mford: Yes. [130]

* * *

ED R. GUERIN

a witness by and on behalf of the Re-
, having been previously duly sworn, was
and testified further as follows:

Direct Examination

vans:

(Testimony of Ed R. Guerin.)

Q. And you have testified? A. Yes.

Q. Now, Mr. Guerin, will you state the circumstances of your own personal knowledge to the hiring of Mr. Spicher by R. B. Guerin Company on the Modoc job?

Just tell us how and in what manner he was employed by your company.

A. Well, we were overhauling a "Caterpillar" sub-contractor by the name of Murien, and he was criticizing a mechanic that was working on the job at that time. He said, "I will get you a good mechanic from Klamath Falls."

And I said, "There is the phone. Get him."

I said, "We are just starting the job and we haven't got a good mechanic, get him over here."

So, two or three days later, Murien came and Mr. Spicher was working on this caterpillar. He said, "Where in the heck did you get that mechanic?"

And I said, "Well, by gosh, that is a good mechanic you ordered from Klamath Falls."

He says, "Like heck I did. I never saw him before."

So I said, "Let's go up and talk to him."

So we went up and we asked what he was doing and what his name was and he told us. And he told us where Mr. Spicher was—now, I don't know and I don't remember what this other mechanic's name was. He said, "Where is Joe Bloke?" [132]

I know that is not his name. "Well,"

ny of Ed R. Guerin.)

hat is all I know about those circum-
[133]

* * *

Cross-Examination

Bamford: [135]

* * *

w, you said, I believe, that General Coun-
or identification—I mean General Coun-
the letter signed by you on the date of
1949, was in fact prepared by Mr. Perry,
orrect?

A. That is right.

d he prepare it and did you sign it at
e?

A. Yes.

. Perry was your bookkeeper on that job,
orrect?

A. Yes.

Mr. Perry still in your employ?

, he isn't.

hen did he leave your employ?

ell, I think around the 15th or 20th of De-
f last year. That is when we shut down
inter.

ow long had he been working for you at the
uit or at the time he was terminated?

believe he started at the time we began the
nd the tenth or 15th of June.

ot too clear, but when we started the job,
it was around the middle of June or some-
here.

(Testimony of Ed R. Guerin.)
charge that [136] was filed on behalf of Mr.
is that correct.

A. Yes. There was some notice. He just
it to me and I said, "Well," and he wrote
letter.

I don't know, but it seemed to me that
some governmental or official document
sort.

Q. Mr. Guerin, I have here what purports
a copy of a letter from the Twentieth
NLRB, to R. B. Guerin and Company, undated
of August 25, 1949.

Will you examine the letter, please?

A. Yes, I believe it was a letter somewhat
that. It seems familiar. Yes, I think I know
that.

Mr. Bamford: With your permission, I
would just like to read the letter in. It is
short.

Mr. Evans: You can introduce it in.
maybe the Examiner and the Board would
have it in. Introduce it in evidence and
can read it, if you want to. I am just making
suggestion. I am not trying to make you
Either way you want to do it.

Mr. Bamford: I would prefer just to read
It is a standard letter. I have already
the sender and the address and the date. The
reads:

lemen:

his will inform you that a charge has been
n the above-entitled case. A copy is en-
. Also enclosed are two copies of an In-
te Commerce form. [137] Please fill in
return one copy and retain the other for
file.

ne investigation of this case has been as-
l to Field Examiner Albert Schneider,
will contact you in the course of the in-
ation. In the meantime, please submit
s office your version of the matters of the
e.

ery truly yours, Gerald A. Brown, Re-
Director."

Mr. Bamford): Now, your memory is,
it was in response to this letter, that you
r letter? A. I believe so.

July 28th?

. Yes, it seems to be in sequence all right.

ns: That was July 25th, wasn't it?

nford: Yes.

Mr. Bamford): And I take it that you
ur letter over to Perry and asked him to
is that correct? A. Yes. [138]

* * *

xaminer Frey: Just a minute. I refer

[142]

(Testimony of Ed R. Guerin.)

Trial Examiner Frey: After Spicher as you testified, how he came to be there was anything further said by Murien?

The Witness: Well, we were overhauled "cat" on a cost basis and he was quite some of the mechanics and, if I remember the cat was all tore apart and we were in a little trouble getting help to put it back together and he was a pretty fussy bird.

In other words, he was really paying through the nose. I believe he suggested running a couple of fellows off. We had a case of another fellow low. He was a very good mechanic on trucks and mobiles, but as a "cat" mechanic, we found he wasn't.

But we always had the policy to give them a chance. At that time I don't believe that cars and trucks had gotten in on the job. Well, he might be a specialist on one line, he might be a dandy truck mechanic or automobile mechanic, but you can't put those fellows on to a D7. [

* * *

LLOYD E. MARTIN

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Evans:

y of Lloyd E. Martin)

tness: Lloyd E. Martin, 116 Granada
an Francisco.

Mr. Evans): Mr. Martin, by whom are
ved at the [143] present time?

regular, most of the time with R. B.
l Company.

* * *

were the master mechanic on the Modoc
B. Guerin and Company, were you not?
t is right.

you know Mr. Spicher here, who has pre-
tified? [144]

w him on a job.

l, now, did you hire him on the job?

sir.

re you on the job, when he came on?

n't remember whether I was right at the
t, when he came on.

l, did you see him when he came on to the

w that first evening, I believe, some time.

y, where did you see him?

king on Murien's cat.

o else was present at that time, when you

A. I don't remember that.

you have a conversation with him?

on't recall that I did, because I didn't

(Testimony of Lloyd E. Martin)

Q. Did you see the work that he was doing at that time?

A. Yes, sir. I checked up on it.

Q. Now, from what you saw there and what he was doing, would you say that he was a qualified heavy duty mechanic?

A. Decidedly not.

Q. Did he seem to know what he was doing in connection with the work that he was working on?

A. Some parts you see, he was doing. On other parts he showed not to be up to par.

* * *

Q. You were in Court yesterday, Mr. Spicher testified, were you not, regarding your conversation with himself and Archibald?

A. Yes.

Q. Now, will you tell us whether or not you were present during that conversation?

A. I was in the shop, I believe. I was not present at the time of it.

Q. Did you hear any of the conversation between Mr. Spicher and Archibald?

A. Never heard a word of it. [147]

* * *

Q. Did you ever discharge Mr. Spicher?

A. No, sir.

Q. Did you ever tell Mr. Spicher that you would not use him on the job?

ny of Lloyd E. Martin)

re him and I didn't feel like it was my place
m. [148]

* * *

ow, as the master mechanic on the job, you
ne help, didn't you?

ired some of the help, yes.

as all the help that you hired union help?
ot necessarily, no.

* * *

ans: Answer the question yes or no. [149]

Examiner Frey: What do you mean by
essarily"? No?

Witness: They hired a big percentage of
n help, that the union said they would clear
e had a blanket order that we had, Ed did,
would clear anybody that wanted to work
ecause help was scarce. Back in that dis-
as scarce.

Examiner Frey: Well, was it the under-
that they would join the union later?

Witness: There was nothing said about
the union man would show up every so
d clear those that we had put to work.

Examiner Frey: Did he ever refuse to
body?

Witness: Just this one instance.

Examiner Frey: How did you find out
t?

(Testimony of Lloyd E. Martin)
Trial Examiner Frey: Who told you
office?

The Witness: I believe George Perry told me.

Trial Examiner Frey: That he refused
him?

The Witness: That they refused to call
him.

* * *

Cross-Examination

By Mr. Bamford:

Q. How long have you known Mr. Archibald?

A. Well, at that time I hadn't known him
about thirty days.

Q. Where did you first meet him?

A. I met him sometime in June on the street.
He came up and introduced himself as the
agent. He was working out of Redding. I
was working out of San Francisco, and that is the
place I hadn't met him.

Q. Could you describe the conversation
with Archibald at that time, please.

A. Well, he come to me and he said, "You
man that is not a union man working." And
"Who is he?"

And he told me, and I said, "Well, to the best
my knowledge, he is a union man. I didn't know
so I don't know. I don't know anything about
him."

Q. Was he talking about Spicher at that time?

A. He was talking about Mr. Spicher.

ny of Lloyd E. Martin)

and was this the same day that you saw
l and Spicher in conversation later?
believe it was.

at you are not positive on that, is that cor-

A. I think it was, yes.

is same day? A. This same day.

at you hadn't met Archibald before the day
her left the employ of R. B. Guerin and
?

don't recall if that was his first trip out on
I got there June the 12th, and I don't re-
her that was his first trip out or not.

perhaps this will refresh your memory, if I
it has been stipulated by counsel that Mr.
reported for work on July 6th and actually
n July 7th and that this conversation be-
chibald and Spicher occurred on July the

t would presumably be on July 8th when
and Archibald had this conversation, and
t know if that then was the first day that
met Archibald?

don't recall that I had met him before that
t, that that was his first trip, because I had
here June the 12th, I believe it was, some-
ng in there, and he only made a trip out
ut once a month. [152]

ee. Did Archibald say how he knew that

(Testimony of Lloyd E. Martin)

Q. And you replied, you said, that you know that he hadn't been a member?

A. I said I didn't know that we had that wasn't union. That is all I said.

Q. Where did this conversation take

A. I believe it was in Cedarville.

Q. And whereabouts in Cedarville?

A. Down at the shop.

Q. And——

A. Or near the shop. Somewhere around

Q. Do you remember what time of day it was?
A. I wouldn't recall that.

Q. Well, how soon did it occur before Archibald and Spicher talking?

A. Oh, I would judge a couple of hours or something like that.

Q. And it was at the shop that this testimony is that correct?

A. Down near the shop, I would say. I don't remember whether it was in the shop or not where. [153]

* * *

Q. Well, what was the usual procedure in dealing with these men?

A. Well, Red Hester said to put an end to the work that looked like they would make a good

Q. That was Archibald's boss?

A. That was Archibald's boss.

Q. Yes.

by of Lloyd E. Martin)

go to work and give them a chance. And
always been Mr. Guerin's attitude also, to
e breaks to anybody like that.

t it was part of the understanding, wasn't
ey would have to get a permit from the
oin the union?

ll, it is customary to sign up in ninety
hink that the law does say something like
you can work on the job ninety days and
is a union job, so-called union job, then
up.

ll, do you think, as you considered this
o you think that Spicher ran into trouble
e wasn't a local man and that is why he
et cleared?

wasn't a capable mechanic.

you discuss that with Archibald?

on't recall if I mentioned that or not. I
ly remember.

ll, then, how was it that he couldn't get
cause he wasn't a capable mechanic, if you
uss it with [162] Archibald?

ns: If he knows.

r Mr. Bamford): If you know, of course.
ouldn't say.

any occasion did you hire a man outside
area, who wasn't a member of the Engi-

n't recall that we hired any from way off

(Testimony of Lloyd E. Martin)
that would fit into that category, is that

A. Well, he was one that you might
He came in from Oregon, which was a lit
away than what we would call local men.

Q. What would you call local men? R
around in Cedarville?

A. Right around the city, so that they
have any housing problems. [163]

* * *

Q. (By Mr. Bamford): Now, what
mean by "we had a blanket order from

A. Well, Hester came down there
"Help is hard to get, and you pick up an
want and we will clear them." That is wh
in the nature of a blanket order.

Q. That was the agreement between R
the company?

A. That was just a conversation.

Q. Who was there, you and Mr. Guer

A. Yes.

Trial Examiner Frey: Was that the
the arrangement you had in effect at
Spicher came on the job?

The Witness: It had always been t
way.

* * *

Q. (By Mr. Bamford): Now, I believ
tified that you saw Mr. Spicher workin

y of Lloyd E. Martin)

at time of day was this?

ll, he was working there the biggest part
that first day.

l did you stand around and watch him?

ould come by once in a while to check up.

you have occasion to talk to Mr. Spicher
s time?

on't believe I had any conversation with

just watched him work, or did you talk
en?

d no words with Murien. [165]

* * *

w long total do you think that you spent
Spicher work?

l, I didn't have much time to stand
d watch anything. I had to go over the
ead, which was about eight miles and I
ch time except to come by once in a while
up and see how things were going.

Spicher was making mistakes, was he?

l, he wasn't doing the work in what you
a workmanlike manner.

l, could you be a little bit more specific
?

l, the work was not first class.

result or the way he was working or

A. Methods.

(Testimony of Lloyd E. Martin)

A. Well, the manner in which he worked like a heavy duty mechanic.

Q. But you didn't speak to him about

A. I had nothing——

Q. Or show him how to do it?

A. I didn't say anything to him.

Trial Examiner Frey: Why didn't

The Witness: Well, that was not the way to go around and comment on their work.

Trial Examiner Frey. Well, did you see the Guerin and [166] Company was paying for a pair of this cat?

A. I never was familiar with any of these business deals. I was merely a mechanic, chief.

Trial Examiner Frey: If you see a man doing the job properly along the mechanical which you had the jurisdiction, didn't you say anything to him about it?

The Witness: If you could see that a man was green at the work, you wouldn't say anything. You would just disregard it and——

Trial Examiner Frey: And what?

The Witness: Just let it go until some other time.

Trial Examiner Frey: What would you say in the future time?

The Witness: Well, at the end of the trial, I would say we didn't need him any more.

Trial Examiner Frey: Did you

ny of Lloyd E. Martin)

n phases of it that would have been all

Examiner Frey: What phases do you think
do, on your observation of what he was

itness: He would be what you would call
field man, and not a mechanic.

Examiner Frey: What is the difference be-
eld man and a mechanic?

itness: A field man takes care of the
d [167] work like that, just adjusts power
clutches, minor stuff like that.

Examiner Frey: And what did you base
lusion on?

itness: Well, just different things that he
g.

Examiner Frey: Tell me what they were.

itness: I don't recall what he was doing,

Examiner Frey: You don't recall what he
g?

itness: You know, only just working on

Examiner Frey: What was he doing on the

itness: Well, we were putting final drives
s and links, things like that on there, but I
ow what part he was working on, when I
ing him

The Witness: Just working on some work that I mentioned.

Trial Examiner Frey: Well, what is it you now to say that the man was not qu work on that cat?

The Witness: Well, I can watch a man whether he is capable.

Trial Examiner Frey: Well, you watched that day, didn't you?

The Witness: Yes.

Trial Examiner Frey. Now, what is it work that [168] led you to believe that qualified to do the work?

The Witness: Well, I just can't remember particular part that he was working on. It's something about the final drives, I believe.

Trial Examiner Frey: What was he doing the final drives?

The Witness: Well, we were putting new parts on the final drives and just adjusting them and one thing or another.

Trial Examiner Frey: What was wrong about that, do you know?

The Witness: I couldn't really say just what was working on, really. It has just been a long time ago.

Trial Examiner Frey: Did you watch him handling his tools?

The Witness: Well, yes, a little.

by of Lloyd E. Martin)

ten or fifteen minutes and then I had to go places.

Examiner Frey. Did you stand watching ten minutes?

Witness: No, I didn't, not ten minutes at a

Examiner Frey: You just passed by, is

Witness: Passed by, more or less, a few

Examiner Frey: Never spoke to him about as doing? [169]

Witness: No, sir, I never talked to him.

Examiner Frey: Well, how was he handling tools?

Witness: Well, I don't recall any certain where that would—any workman can look at workman and in just a few minutes they can know what they are doing or not.

Examiner Frey: Well, can't you describe what was doing which indicated to you that he qualified to do the work or wasn't handling right?

Witness: No, sir, I couldn't recall. It has long.

Examiner Frey: All right, proceed. [170]

* * *

ans: For the purpose of the record, I will

Trial Examiner Frey: I think that stood. [172]

* * *

DICK W. SPICHER

recalled as a witness by and on behalf of
eral Counsel, having been previously de-
was examined and testified further as fol-

Direct Examination

By Mr. Bamford:

Q. Mr. Spicher, I believe you testified
examination that your wife called you at
up at Madras and told you that someone
from Cedarville about this job, and that
your wife to call back, and she reported
did call back, and then you went down to
Falls, is that correct? A. That is

Q. And while you were at Klamath
night, this fellow from Cedarville called
that correct? A. That is correct.

Q. And wanted to know when you were
down? A. That is right.

Q. Now, who was this fellow that called
know?

A. Well, I don't recall his name. It seemed
like it was Murien.

Q. You are not sure of that?

A. I am not sure of it, no.

Q. Did you know Murien?

y of Dick W. Spicher.)

no. I am not [174] personally acquainted

have never met him? A. No.

our conversation with Murien, did he in-

it was that he had known about you?

he did. [175]

* * *

Mr. Bamford): I believe the last ques-

How did Murien know about you?

l, he knew about me, he remembered me.

ard Ellis, he used to work for him.

ns: What was his name?

ness: I believe his name was Meinard

skinner.

Mr. Bamford): Where did you know

used to work for this Dunne Construction.

say that he was a cat skinner?

skinner.

long did he work for Dunne?

ould say two, two and a half, or three

your knowledge, was he a heavy duty

A. No. He was just an operator.

ieve you testified also that when you re-

work the next day, that you saw Murien,

ect? A. Correct. [176]

t was the conversation between you and

(Testimony of Dick W. Spicher.)

The Witness: Well, Murien said, "W
you been all this time?" [177]

* * *

Q. (By Mr. Bamford): What did you

A. Well, I don't recall what I replied
to "come in here and get signed up a
work."

Q. Did he recognize you by sight?

A. Yes.

Q. Did you recognize him by sight?

A. Yes, I did.

Q. But you had never met?

A. No, I was never introduced to hi
seen the man.

Q. Do you know what his first name w

A. No, I can't say as I do.

Q. You actually worked only one day
that correct?

A. That is correct.

Q. Now, during any time of that da
work in the shop at Cedarville?

A.

Q. Will you describe what you did the

A. Well, we worked out on the job. I
that it was around three and half to four
the shop at Cedarville, approximately.

Q. Did you report to the job site or d
port to the shop?

A. I reported to the shop early in the

Q. And what happened at that time?

y of Dick W. Spicher.)

ich you did? A. Which I did.

you work on that cat all day?

I worked on it for a while and then I

he points on another cat, on a 'dozer?

s that cat near by the first cat?

was near by the first cat, yes, and I think

s close to noon. Then we went on down

he left hand side of the road, going out of

to the rest of the cats, and put on some

ls.

y did you get down there, further down?

ent down there with the welder and the

anics.

you walk down or drive down?

e down. They had a pickup.

they picked up your tools?

y picked up my tools and rode on down

of the cats. [179]

* * *

Mr. Bamford): During the day that

d out on the road, did you observe Mr.

tching your work? A. No, sir.

you have any occasion to talk with Mr.

t day? A. I did not.

you at any time you were employed by

in, did you talk with Mr. Guerin, Senior,

pany of Murién?

d not. [181]

Cross-Examination

By Mr. Evans:

Q. Mr. Spicher, you say that Murien
“Where have you been?” A. Yes.

Q. And he said, “Well, come on, go to
A. Yes.

Q. He hired you, didn’t he? A.

Q. Well, he said, “Come on and go to

A. Well, he took me in the office to get

Q. And what did he say to the man in
when he took you in there?

A. He told the man in the office that
Spicher, the mechanic,” and this fellow is
—I don’t recall his name. I believe they
the day I went to work there. He said,

So we got the card and signed me up
handed me the card and said, “Sign this.
it and gave him the card back.

Q. You knew that Murien was merely
contractor on the job, didn’t you?

A. No, I didn’t.

Q. You know that now, don’t you?

A. No. I don’t know as I do.

Q. Do you know of your own knowledge
he was employed by [182] Guerin and Co.

A. He was down there at Ed Guerin
the job, with a couple of cats. I didn’t know
was subject to Guerin or renting the

by of Dick W. Spicher.)

was the one that called you to go down
go to work?

was the one that called me in Klamath
e in town.

* * *

ED. R. GUERIN

s a witness by and on behalf of the Re-
having been first previously sworn, was
and testified as follows:

Direct Examination

vans:

Guerin, who was Mr. Murien?
and a fellow named Cox were sub-con-
ne clearing on the job.
s he employed by Guerin in any other ca-
er than as a sub-contractor? [183]

* * *

y Mr. Evans): Was he ever authorized
yone on behalf of Guerin and Company?

ns: That is all.

xaminer Frey: What kind of a sub-con-
ou have with them?

itness: Well, we had, I believe ninety
clearing and he and Cox "subbed" that
earing.

(Testimony of Ed. R. Guerin)
into a contract with us for a certain amount
of money per acre, under the same specifications
that we did for it to the California Highways
Commission.

Trial Examiner Frey: Now, did you make
special arrangement with him about the main-
tenance of his cats?

The Witness: Only this one cat. It came
in job in terrible shape and he asked us to do
with our mechanics.

Trial Examiner Frey: With your mechanics?

The Witness: Yes, and we arranged for
and the necessary parts and everything. We
those and then charged it back against him
as an offset.

Trial Examiner Frey: And the work
Spicher started [184] to do was on that cat,
correct?

The Witness: Yes.

Trial Examiner Frey: He was working on
then, working on that cat, is that right?

The Witness: That is right.

I understand now, if I could qualify to
understand, you understand, we, in turn, would
what he had coming on his estimate of charges
what labor was performed on his cat.

Trial Examiner Frey: That is right. I
what I understood you to say. In other words,
you took one of your men—in this case, the

by of Ed. R. Guerin)

Whatever it was per hour, would be charged

Curien, is that correct?

Witness: That is right. [185]

* * *

Amford: Let the record show that the par-
tate that on September 21, 1949, Respond-
e an unconditional offer of reinstatement to
Spicher by way of a letter mailed on Sep-
t from San Francisco to Mr. Spicher's
Klamath Falls, Oregon.

ans: Upon the recommendation of Brad-
ls, the Field Examiner of the NLRB.

Amford: As amended, the stipulation is
ry.

ans: It is satisfactory to the Respondents.

Examiner Frey: Do both sides now rest?

ans: Respondent rests.

Amford: Yes.

Examiner Frey: Does General Counsel

Amford: Yes. [187]

* * *

d July 31, 1950.

NATIONAL LABOR RELATIONS BOARD
Petitioner

vs.

ROBERT S. GUERIN, RAYBURN B.
and ED. R. GUERIN, Individually and
Partners, d/b/a R. B. GUERIN
COMPANY, General Contractors,
Respondent

CERTIFICATE OF THE NATIONAL
LABOR RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary duly authorized by 102.87, Rules and Regulations of the National Labor Relations Board—Series 6, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of the proceedings had before said Board, entitled, “In the Matter of Robert S. Guerin, Rayburn B. Guerin and Edward R. Guerin, individually and as co-partners, d/b/a R. B. Guerin & Company, General Contractors, and W. Spicher, an individual,” the same being designated as Case No. 20-CA-274 before said Board, said transcript including the pleadings and testimony and evidence upon which the order of the Board in the proceeding was entered, and including also the findings and order of the Board.

enumerated, said documents attached hereto
ows:

S. Hawkins' (charging party's representative, addressed to Examining Officer concerning pertinent facts concerning the charge, re-
y 25, 1949.

Order designating Eugene F. Frey Trial
for the National Labor Relations Board,
y 18, 1950.

enographic transcript of testimony taken
ial Examiner Frey on July 18 and 19,
ther with all exhibits introduced in evi-

ipulation of the parties to correct the rec-
August 8, 1950.

py of Trial Examiner's Intermediate Re-
l September 27, 1950, (annexed to item
order transferring case to the Board
tember 27, 1950, together with affidavit of
d United States Post Office return re-
eef.

spondents' exceptions to the Intermediate
ceived October 17, 1950.

py of Decision and Order issued by the
Labor Relations Board on January 30,
Intermediate Report annexed, together
avit of service and United States Post
rn receipts thereof.

mony Whereof, the Executive Secretary
ional Labor Relations Board, being there-

Relations Board in the city of Washington
of Columbia, this 22nd day of June, 1951

/s/ FRANK M. KLEILER

Executive Secretary

[Seal]

NATIONAL LABOR
RELATIONS BOARD

[Endorsed]: No. 12994. United States
Appeals for the Ninth Circuit. National
Labor Relations Board, Petitioner, vs. Robert S.
Rayburn B. Guerin and Ed R. Guerin, In
and as Co-Partners, Doing Business as R.
& Company, General Contractors, Re
Transcript of Record. Petition for Enforcement
Order of the National Labor Relations Board

Filed June 27, 1951.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals
Ninth Circuit.

ON FOR ENFORCEMENT OF AN ORDER
OF THE NATIONAL LABOR RELATIONS
BOARD

Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

National Labor Relations Board pursuant to
National Labor Relations Act, as amended (61
29 U.S.C., Supp. III, Secs, 151 et seq.),
here called the Act, respectfully petitions
for the enforcement of its order against
respondents, Robert S. Guerin, Rayburn B. Guerin
and Rayburn B. Guerin, individually and as co-partners,
Rayburn B. Guerin & Company, General Contractors,
San Francisco, California, their agents
and attorneys. The proceeding resulting in said order
is upon the records of the Board as "In
re Robert S. Guerin, Rayburn B. Guerin
and Rayburn B. Guerin, individually and as co-partners,
Rayburn B. Guerin & Company, General Contractors,
Dick W. Spicher, an individual, Case No.

."

Support of this petition the Board respectfully

respondents are engaged in business in the
State of California, within this judicial circuit
whereby unfair labor practices occurred. This

(2) Upon all proceedings had in sa before the Board as more fully shown by record thereof certified by the Board and this Court herein, to which reference made, the Board on January 30, 1951, d its findings of fact and conclusions of issued an order directed to the Respond agents and assigns. The aforesaid order as follows:

ORDER⁵

Upon the entire record in the case and to Section 10 (c) of the National Labor Act, the National Labor Relations Board orders that the Respondents, Robert S Rayburn B. Guerin and Ed R. Guerin, in and as co-partners, d/b/a R. B. Guerin & General Contractors, South San Francisco, their agents and assigns shall:

1. Cease and desist from:

(a) Encouraging membership in Engineers Local Union No. 3 of the tional Union of Operating Engineers, other labor organization of their emp discharging any of their employees o inating in any other manner in regar hire or tenure or employment or an condition of their employment;

(b) In any other manner interfere

aining, or coercing their employees in the
ise of the right to self-organization, to
, join, or assist labor organizations, to
ain collectively through representatives of
own choosing, to engage in concerted ac-
es for the purpose of collective bargaining
her mutual aid or protection, or to re-
from any or all of such activities, ex-
to the extent that such right may be af-
d by an agreement requiring membership
labor organization as a condition of em-
ment, as authorized in Section 8 (a) (3)
e Act.

ke the following affirmative action, which
d finds will effectuate the policies of the

0 Make whole Dick W. Spicher, in the
er set forth in the section of the Inter-
ate Report entitled "The remedy," for
loss of pay he may have suffered as a re-
of the Respondents' discrimination against

0 Upon request, make available to the
onal Labor Relations Board, or its agents,
amination and copying, all pay roll rec-
social security payment records, time
, personnel records and reports, and all
records necessary to an analysis of the
nt of back pay due under the terms of

Cedarville, Meade County, California;
any other projects presently operated
copies of the notice attached to the
ate Report and marked Appendix A
of said notice, to be furnished by the
Director for the Twentieth Region, s
being duly signed by the Responder
sentative, be posted by the Responde
diately upon receipt thereof and main
them for sixty (60) consecutive da
after, in conspicuous places, incl
places where notices to employees ar
arily posted. Reasonable steps shall
by the Respondents to insure that sa
are not altered, defaced, or covere
other material;

(d) Notify the Regional Director
Twentieth Region, in writing, within
days from the date of this Order, w
the Respondents have taken to com
with.

(3) On January 30, 1951, the Board's
and Order was served upon Respondent b
copies thereof postpaid, bearing Governme
by registered mail, to Respondents' couns

⁶This notice, however, shall be, and it
amended by striking from line 3 thereof t
"The Recommendations of a Trial Exami
substituting in lieu thereof the words, "A
and Order." In the event that this Or

rsuant to Section 10 (e) of the National
lations Act, as amended, the Board is
and filing with this Court a transcript
tire record of the proceeding before the
cluding the pleadings, testimony and evi-
dings of fact, conclusions of law, and
he Board.

ore, the Board prays this Honorable Court
use notice of the filing of this petition
cript to be served upon Respondent and
Court take jurisdiction of the proceeding
e questions determined therein and make
upon the pleadings, testimony and evi-
d the proceedings set forth in the tran-
d upon the order made thereupon as set
paragraph (2) hereof, a decree enforcing
said order of the Board, and requiring
nts, their agents and assigns to comply

**NATIONAL LABOR
RELATIONS BOARD,**

By /s/ A. NORMAN SOMERS,
Assistant General Counsel.

at Washington, D. C., June 22, 1951.

Appendix A

NOTICE TO ALL EMPLOYEES

Relations Act, we hereby notify our employees

We Will Not encourage members of the International Union of Operating Engineers Local Union No. 100 or in any other labor organization to discriminate against our employees, by discriminatorily discharging our employees or by discriminating in any other manner in regard to their hiring or of employment or any term or condition of employment.

We Will Not in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self organization, form, join, or assist labor organizations to bargain collectively through representatives of their own choosing, to engage in other lawful activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities except to the extent that such right is affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(5) of the Act.

We Will Make Whole Dick W. Smith for any loss of pay suffered by him as a result of our discrimination against him at our plant at Cedarville, Modoc County, California.

All our employees are free to become members of the

on. We will not discriminate in regard to
r tenure of employment or any term or
of employment against any employee be-
is membership or nonmembership in any
anization.

R. B. GUERIN & COMPANY,
Employer.

.....

By,
Representative.

Title

ice must remain posted for 60 days from
ereof, and must not be altered, defaced,
by any other material.

ed]: Filed June 27, 1951.

court of Appeals and Cause.]

STATEMENT OF POINTS RELIED UPON BY PETITIONER

onorable, the Judges of the United States
of Appeals for the Ninth Circuit:
tional Labor Relations Board, Petitioner
plying with Rule 19 (6) of the Rules of
, files the following statement of points
h it intends to rely in the above-entitled
and the following designation of points

Statement of Points

1. The Board properly asserted jurisdiction over the unfair labor practices involved herein.
2. The Board's findings are supported by substantial evidence on the record considered.
3. The Board's order is valid and proper.

Dated at Washington, D. C., this 22nd
June, 1951.

/s/ A. NORMAN SOMERS
Assistant General Counsel

NATIONAL LABOR
RELATIONS BOARD

[Endorsed]: Filed June 27, 1951.

[Title of Court of Appeals and Cause.]

ORDER TO SHOW CAUSE

United States of America—ss.

The President of the United States of America

To Robert S. Guerin, Rayburn B. Guerin

R. Guerin, individually and as co-defendant

d/b/a R. B. Guerin & Co., General Contractor

P. O. Box 201, South San Francisco, California

Associated General Contractors of America

Union of Operating Engineers, 1095 Mar-
., San Francisco, California

t to the provisions of Subdivision (e)
160, U. S. C. A. Title 29 (National Labor
Board Act, Section 10(e)), you and each
hereby notified that on the 27th day of
, a petition of the National Labor Re-
ard for enforcement of its order entered
y 30, 1951, in a proceeding known upon
s of the said Board as

the Matter of Robert S. Guerin, Ray-
B. Guerin and Ed R. Guerin, individually
s co-partners, doing business as R. B.
& Company, General Contractors, and
W. Spicher, an individual, Case No.
-274,"

ntry of a decree by the United States
Appeals for the Ninth Circuit, was filed
United States Court of Appeals for the
cuit, copy of which said petition is at-
eto.

also notified to appear and move upon,
plead to said petition within ten days
of the service hereof, or in default of
the said Court of Appeals for the Ninth
l enter such decree as it deems just and
the premises.

in the year of our Lord one thousand, nine
and fifty-one.

[Seal] /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

Returns on service of writ attached.

[Endorsed]: Filed July 10, 1951.

**United States Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

**R. B. GUERIN, RAYBURN B. GUERIN, AND ED R.
GUERIN, INDIVIDUALLY AND AS COPARTNERS, DOING
BUSINESS AS R. B. GUERIN & COMPANY, GENERAL
MANUFACTURERS, RESPONDENTS**

**FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL
LABOR RELATIONS BOARD**

FOR THE NATIONAL LABOR RELATIONS BOARD

GEORGE J. BOY,

General Counsel,

DAVID P. FINDLING,

Associate General Counsel,

A. NORMAN SOMERS,

Assistant General Counsel,

FREDERICK U. REEL,

GERALD F. KRASSA,

Attorneys,

National Labor Relations Board.

FILED

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**the United States Court of Appeals
for the Ninth Circuit**

No. 12994

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

S. GUERIN, RAYBURN B. GUERIN, AND ED R.
N, INDIVIDUALLY AND AS COPARTNERS, DOING
ESS AS R. B. GUERIN & COMPANY, GENERAL
ACTORS, RESPONDENTS

*ON FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL
LABOR RELATIONS BOARD*

FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

ase is before the Court upon the petition of
onal Labor Relations Board (hereinafter
ne Board) for enforcement of its order
0) issued against respondents on January
pursuant to Section 10 (c) of the National
elations Act, as amended (61 Stat. 136, 29
Supp. IV, Sec. 151 *et seq.*, hereinafter referred
Act.)¹ The Board's decision and order are
in 92 NLRB No. 255. This Court has juris-

unfair labor practice in question (the discharge of employee Dick Spicher for nonmembership in the organization) occurred in Modoc County, California, within this judicial circuit.

STATEMENT OF THE CASE

A. The Board's findings of fact and conclusions of law

1. The business of the respondents

In July 1949 at the time of the unfair labor practice here involved, respondents, general construction contractors, were principally engaged under contract with the State of California in filling, grading, and paving 8.1 miles of California State Highway 28 between Cedarville and Tom's Creek, Modoc County, California (R. 21, 57; 65, 76-77).³ At the time Highway 28 runs in an easterly direction and is the link between the last highway junction in California (with United States Highway 395) and the highway system of the State of Nevada, the portion of which it crosses a few miles east of the site at which respondents worked (R. 21-23, 57; 76-77). The portion of the highway on which respondents worked appears to be the main traffic artery connecting northeast California and northwest Nevada (R. 23; 76-77). From June 1, 1949, to June 30, 1949, respondents' direct out-of-State purchases were

² The Board adopted the findings, conclusions, and recommendations of the Trial Examiner with certain additional modifications (R. 56).

³ Record references which precede the semicolon are to the findings of fact and conclusions of law of the Board.

ly \$18,165.25, and they also rented road machinery, partly new, valued at \$300,000, for the most part, was manufactured and assembled in States other than California (R. 21-22, 72-76). Upon these facts the Board found respondents were engaged in interstate commerce within the jurisdiction of the Board (R. 56-57).

Engaging of Employee Spicher as a man supposedly cleared by the Union
Respondents had subcontracted part of the work on Highway 28 to the firm of Muerin and Cox (R. 131-132). When one of the caterpillar tractors used on the job required overhauling, Muerin contacted respondents to overhaul it at his expense (R. 30; 99). However, when Muerin became dissatisfied with the work of the mechanic whom respondents had recommended for that job, respondent Ed R. Guerin told respondents to find a mechanic satisfactory to him (R. 30; 99). Muerin thereupon asked Dick W. Spicher, an experienced heavy duty mechanic (R. 34; 100-101, 102) who was then working at Cedarville, to come to Cedarville to work on the job (R. 30, 33; 92-93, 96-128). One of respondents' office employees contacted Spicher on July 5, 1949, telling him to come to Cedarville, and expressly advised him that respondents had cleared him with Operating Engineers' Local Union No. 3 of the International Union of Operating Engineers, hereinafter called the Union (R. 93, 98-99). At that time respondents' policy was to hire only men approved by the Union in order to avoid a work stoppage by union men on the job.

(R. 43, 44; 86-88).

3. The firing of Spicher upon the Union's refusal to clear

After signing papers at respondent's field July 6, 1949, Spicher actually reported for respondent's shop on the project on July 7, 1949 (R. 93-94, 99, 101, 127-130). That day he performed work on various equipment to which Lloyd Martin, respondent's chief mechanic, assigned him, including a Caterpillar tractor (R. 31; 129).

When Spicher reported for work the next day, July 8, in the morning, Martin told him to come back for the evening shift, starting at 3:30 p.m. (R. 31; 94). Returning at that time, Spicher met outside the shop by Archibald, the business manager of the Union, who asked whether Spicher had a union book and clearance from the Union (R. 31; 102). Spicher replied that he did not have one, but he had with him and that he had been cleared with the Union through respondents' office (R. 31; 94). By that time Master Mechanic Martin had come to the shop and joined Spicher and Archibald (R. 31; 95, 103). Archibald asked Martin, who was a member of the Union himself (R. 31; 88), whether he had seen Spicher's clearance. Martin replied that he had not (R. 31; 95, 103). Thereupon Archibald told Spicher: "There is nothing I can do for you now, then," adding that he had men at the Local Union for jobs (R. 31; 95, 103-104). Archibald asked Martin whether he could get along without Spicher

had power to discharge employees (R. 40; told Spicher "I guess I can't use you, then" and Archibald went away together (R. 32;

thereupon left the job (R. 32; 96). He only for his work on July 7, 1949 (R. 32). Spicher had filed a charge against respondents Board, and after some correspondence had between respondents and the Board's Regional San Francisco,⁴ respondents offered Spicher payment on September 21, 1949 (R. 32; 133).

On these facts, the Board found that Spicher was employed by respondents because of the refusal of respondents to "clear" him, and that such discharge violated Section 8 (a) (3) and (1) of the Act (R.

B. The Board's order

The Board ordered respondents to cease and desist from discouraging membership of their employees in a union or any other labor organization by discharging employees or in any other manner discriminating against them with regard to hire or conditions of employment, and from in any other manner interfering with, restraining or coercing their employees in the exercise of the rights protected by the Act. Accordingly, the order requires respondents to make

When served with the charge, respondents wrote the Regional Office on July 28, 1949, stating their "undertaking [they] must employ union members in good standing, willing to become affiliated with a union or else have all their members off the project" and their conduct.

September 21, 1949, and to post appropriate appropriation (R. 58-60).

ARGUMENT

I

Respondents are engaged in interstate commerce
Board properly asserted jurisdiction over their operations

In the light of settled authority establishing the right of the State to regulate the repair and maintenance of highways constituting an interstate commerce, respondents' operations in repairing California Highway No. 28 at the point where it necessarily carried traffic between California and Nevada were plainly subject to the jurisdiction of the Board. *Overstreet v. North Shore Co.*, 107 U. S. 125, 129-130; *Bennett v. Loftis*, 167 U. S. 125, 129-130; *Bennett v. Loftis*, 167 U. S. 125, 129-130 (C. A. 4), and cases there cited. An equitable basis for the Board's assertion of jurisdiction may be found in respondents' purchases of materials and equipment directly from without the State and their use of new equipment manufactured and assembled outside the State. *N. L. R. B. v. Denver Bldg. Co.*, 307 U. S. 675, 683-684; *N. L. R. B. v. Townsend*, 307 U. S. 378, 382 (C. A. 9), certiorari denied, 341 U. S. 840. Respondents' suggestion that the Board should have declined as a matter of policy to assert jurisdiction here is not well taken, for the Board's jurisdictional policy expressly includes operations such as those of respondents' (see *Hollow Tree Lumber Co.*, 107 L. R. B. No. 113, 26 L. R. R. M. 1543; *Depey Co.*, 92 NLBB No. 36, 27 L. R. B. M. 1057).

...Providing the Board acts within its and constitutional power, it is not for the say when that power should be exercised.”
d case, *supra*, 185 F. 2d at 383.

II

all evidence supports the Board’s finding that respondents discharged Spicher for nonmembership in the violation of Section 8 (a) (3) and (1) of the Act

Evidence summarized above (pp. 4–5) establishes respondents’ master mechanic Martin, who had to discharge employees, was advised by Union that it had not cleared Spicher for employment, and that Martin thereupon told Spicher, “I can’t use you, then.”⁵ This evidence fully supports the Board’s finding that respondents discharged Spicher because he was not “cleared” for employment by the Union. That a discharge under these circumstances contravenes Section 8 (a) (3) is well settled to require argument. *N. L. R. B. v. Camera Corp.*, 180 F. 2d 445, 447 (C. A. 9), and cases cited.⁶

Respondent’s denial that he made this statement raised a conflict with his testimony and that of Spicher. The Trial Examiner accepted his reasons for accepting Spicher’s version (R. 32, n. 7). The Board adopted the Trial Examiner’s credibility findings. See *Camera Corp. v. N. L. R. B.*, 340 U. S. 474, 488.

There is no contention that respondents had a valid union agreement permitting discharge for nonmembership in the Union (R. 42–43). Moreover, no such contract could lawfully require the discharge of a newly hired employee within 30 days of hiring, and even after that period discharge could be required only for nonpayment of union dues and initia-

Spicher was hired by mistake, that he was not to do the work, and that he left the job of accord either because he discovered he could not do the work,⁷ or because of some compulsion by the Union. In rejecting these contentions the Examiner and the Board relied not only upon the credited testimony as to the circumstances of Spicher's termination (*supra*, pp. 4-5) but also upon the testimony that he had talked to Muerin about his situation before he was hired (R. 33; 127), upon the lack of any credible evidence that he was not qualified for the work (R. 33-34; 121-125), and upon respondent Ed R. Muerin's admission that respondents would not retain employees not "cleared" by the Union (R. 35-40). In addition to the grounds expressed by the Board for rejecting respondents' contentions, it may be noted that the contentions as to "mistaken identification" and want of qualifications are palpable after a review of which respondents not only failed to advance any letter to the Board written 3 weeks after Spicher's discharge (see *supra*, note 4), but which are inconsistent with the reasons there stated. Moreover, in the letter and in his testimony, respondent Muerin Guerin did not rely upon the simple allegation that Spicher had quit but instead explained his termination in the light of the Union's economic pressure upon respondents. It is, of course, beyond dispute

⁷ Respondents nowhere explain the contradiction between Spicher's returning to his job twice on July 8 (*supra*

tion of economic hardship is not an excuse for the Act. *N. L. R. B. v. Star Publishing Co.*, 465, 470 (C. A. 9); *N. L. R. B. v. Graham*, 787, 788 (C. A. 9); *N. L. R. B. v. Gluek Co.*, 144 F. 2d 847, 853-854 (C. A. 8), and are cited.

Board's finding that respondents discharged because of the Union's refusal to "clear" him employment is therefore supported not only by the testimony of the dischargee, but by the respondents' contentions upon analysis actually support the Board's finding. Since this finding of fact is thus supported by substantial evidence on the record considered as a whole, it follows that the Board properly concluded that Spicher's discharge violated Section 8 (a) (3).

III

The Board's procedure was valid and proper

Respondents contended that the entire proceeding should be dismissed because the Board in its complaint had not joined the Union and the Associated General Contractors of America ("AGC")⁸ as parties. If this objection were well taken the Board would be powerless to remedy the unfair labor practices in this case, for the scheme of the National Labor Relations Act is such that no person can be a party respondent who has not been named in

Respondents belonged to AGC, which had a contract recognizing the Union as exclusive bargaining representative. The

a charge, and no charge was made against AGC or the Union. However, the objection be devoid of merit even in private litigation so all the more in the light of the public protected by the administrative proceeding Board.

Neither the AGC nor the Union were "necessary parties in the accepted sense that their participation was necessary in order to adjudicate the controversy. Had they been "necessary" parties, non-joinder would still be excusable because a finding that these parties, not named in any complaint, would have deprived the Board of jurisdiction to proceed in the case. Cf. Federal Rules of Procedure, Rule 19 (b). Since the controversy was between the Board and the respondent company, it did not extend to AGC and the Union, and

⁹ Pursuant to Section 10 (b), "the Board * * * has the power to issue * * * a complaint" "whenever it finds that any person has engaged * * * in any * * * unfair labor practice." See *N. L. R. B. v. Hopwood Retinners*, 384 U.S. 98 F. 2d 97, 102 (C. A. 2). This statutory scheme has been applied in cases of discriminatory discharges caused by unions in proceedings against the employer alone like the present case, also in proceedings against the union alone. See *e. g.* *Union of Marine Cooks and Stewards, C. I. O.*, December 19, 1950, 92 N. L. R. B. No. 147, 27 L. R. R. M. 1172; *Pen and Pen*, *Local 19,593*, October 10, 1950, 91 N. L. R. B. No. 147, 27 L. R. R. M. 1583; *International Union, United Automobile Workers, Local 291*, December 27, 1950, 92 N. L. R. B. No. 147, 27 L. R. R. M. 1188; *International Heat and Frost Insulators, Local 7, AFL*, December 21, 1950, 92 N. L. R. B. No. 134, 27 L. R. R. M. 1154. In those cases the Board ordered the respondent union to make the discharges whole.

tion by the Board does not affect, or interfere with, any legal right of these entities, they are, therefore, not "indispensable" parties. "If the case is completely decided, as between the litigant and the circumstance that an interest exists in the person, whom the process of the court reaches, * * * ought not to prevent a decree on its merits." *Elmendorf v. Taylor*, 10 Wheat. 47-168, as quoted by Mr. Justice Curtis in *Barrow*, 17 How. 130, 142; Moore's Federal Practice (2d ed. 1948) Par. 19.07.¹⁰

Under these circumstances¹¹ it is unnecessary to inquire to what extent the traditional rules on compulsory joinder of parties apply to Board proceedings. Suffice it to refer to the statement of the Supreme Court in *Barrow* that a proceeding so narrowly restricted to the protection and enforcement of public rights, there is no hope or need for the traditional rules govern-

ing. If the Union been joined as a party and found to have violated the Act, respondents would have been jointly and severally liable with the Union. *Union Starch & Refining Co. v. United States*, 186 F. 2d 1008, 1013-1014 (C. A. 7), certiorari denied, 338 U. S. 838, 70 S. Ct. 130, 1951. By analogy to the law governing joint tortfeasors it follows that the Union was not an indispensable party. Respondents are not indispensable or necessary to an action against the respondents, because their liability is both joint and several. Moore's Federal Practice (2d ed. 1948) Par. 19.07; *First Nat. Bank v. Johnson*, 251 U. S. 68, 84; *Mason v. United States*, 82 Fed. 689, 690 (C. A. 7).

Respondent's objection to the nonjoinder of the AGC was overruled by the Board's declaration that, unlike the Trial Court, it did "not predicate [its] findings herein on any evidence relating to the organization and functions of The Asso-

private rights." *National Licorice Co. v. N. L.*
309 U. S. 350, 363. See also *N. L. R. B. v.*
& Michigan Electric Co., 124 F. 2d 50, 53-55
6), and cases there discussed, affirmed with
cussion of this point, 318 U. S. 9.

CONCLUSION

It is respectfully submitted that the Board p
assumed jurisdiction of this case, that its find
supported by substantial evidence on the reco
sidered as a whole, that its order is valid a
a decree should issue enforcing the order in
prayed in the Board's petition.

GEORGE J. BOTT,
General Counsel

DAVID P. FINDLING,
Associate General Counsel

A. NORMAN SOMERS,
Assistant General Counsel

FREDERICK U. REEL,
GERALD F. KRASSA,
Attorney

National Labor Relations Board

NOVEMBER 1951.

APPENDIX

relevant provisions of the National Labor Act, as amended, in effect at the times relevant 61 Stat. 136, U. S. C. Supp. IV, Sec. 151, are as follows:

DEFINITIONS

SEC. 2. When used in this Act—

* * * * *

(6) The term “commerce” means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term “affecting commerce” means commerce, or burdening or obstructing commerce or the free flow of commerce, or having or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such

may be affected by an agreement membership in a labor organization a tion of employment as authorized i 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair practice for an employer—

(1) To interfere with, restrain, employees in the exercise of the rights guaranteed in Section 7;

* * * *

(3) By discrimination in regard to tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization *provided*, That nothing in this Act, or in any statute of the United States, shall prevent an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action in violation of Section 8 (a) of this Act as an unfair practice) to require as a condition of employment membership therein on or before the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such organization is the representative of the employees as provided in Section 9 (a) of this Act, by such agreement when made; and (ii) following the most recent election held in accordance with the provisions provided in Section 9 (e) the Board of Contract Administration have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: *Provided*, That no employer shall justify any discrimination on the basis of

grounds for believing that such member was not available to the employee on the terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or maintaining membership;

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise.

* * *
(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint is engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *.

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court

spectively, wherein the unfair labor in question occurred or wherein such resides or transacts business, for the ment of such order and for appropriate relief or restraining order, certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall give notice thereof to be served upon such party and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make such order upon the pleadings, testimony, and proof set forth in such transcript a decree modifying, and enforcing as so modified, and setting aside in whole or in part the order of the Board. No objection that has been urged before the Board, its member, or its agency, shall be considered by the court on the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board shall be conclusive in respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

E. TOOR,

Appellant,

vs.

C. WESTOVER,

Appellee.

E. TOOR and FLORENCE D. TOOR,

Appellants,

vs.

C. WESTOVER,

Appellee.

APPELLANTS' OPENING BRIEF.

FINK, ROLSTON, LEVINTHAL & KENT,
6253 Hollywood Boulevard,
Los Angeles 28, California,

LEO V. SILVERSTEIN,
837 Van Nuys Building,
Los Angeles 14, California,

SCHWARTZ, GALE & BLOOM,
6253 Hollywood Boulevard,
Los Angeles 28, California,



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I.

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II.

A proper application of the principles, governing the determination of the validity of a partnership, to the facts established by the record, indicates that the conclusion of the trial court as to the validity of the partnership is correct as to law

A. The following principles of law govern the determination of the validity of the partnership in the present case

- (1) If a partnership exists under commercial law, it also exists for tax purposes—the tests are the same. The ultimate question is whether the partnership was a sham or whether there was a real partnership to carry on the business as a partnership.....
- (2) There is no different test to be applied in determining the validity of a family partnership than is applied in testing the validity of a partnership with strangers
- (3) There is no distinction between limited partnerships and general partnerships for income tax purposes, and limited partnerships are recognized for tax purposes
- (4) A partnership is an organization for the distribution of income to which each partner contributes one or both of the ingredients of income—capital or services
- (5) Neither original capital nor services are necessary requisites to the validity of a partnership, the test being the reality of intent to carry on the business as a partnership.....

7) The desire to reduce taxes will not defeat the validity of a transaction so long as the transaction is bona fide and is not entered into for the sole motive of saving taxes.....	48
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Even if not given retroactive effect, the correction of the clerical error was accomplished on December 14, 1943, rather than on January 13, 1944, as found by the court. This correction was accomplished within the calendar taxable year of Mr. and Mrs. Toor and of

D. The same government accepted the donee's return shortly after the creation of the trusts on an irre- basis; the same government, in renegotiating w- tracts, demanded and received some \$60,000 base a recognition of the partnership and its fisc- which could not otherwise have been assessed lected

Conclusion

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IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

E. TOOR,

Appellant,

vs.

WESTOVER,

Appellee.

E. TOOR and FLORENCE D. TOOR,

Appellants,

vs.

WESTOVER,

Appellee.

APPELLANTS' OPENING BRIEF.

Jurisdiction.

peal involves federal income taxes for the cal-
s 1943, 1944 and 1945 of appellants Herbert E.
Florence D. Toor. The taxes in dispute with
Mr. Toor for those years, amounting to a total
99.29, were paid by Mr. Toor on or about No-
5, 1948, under protest after additional assess-
l been made by the Commissioner of Internal
R. 7, 9, 14, 17, 22, 25]. Claims for refund were

for the recovery of the alleged overpayment [Substantially similar assessments were made to by Florence D. Toor the wife of Herbert E. Toor similar action was brought against the Collector Internal Revenue on account thereof by Herbert and Florence D. Toor. The two cases involved issues and were consolidated for hearing before District Court. It was stipulated between counsel decision on appeal in the first case, bearing District No. 10461-Y should be applied to and be decision on appeal from the second case bearing District No. 10462-Y (p. 515). Jurisdiction was conferred on District Court by 28 U. S. C. A. Sec. 1340. Judgments were entered on January 11, 1951 (pp. 80-81). Motions for a new trial were duly filed by plaintiffs on January 22, 1951, and orders denying such motions were entered on February 6, 1951. On April 5, 1951, notices of appeal were filed [R. 82-84] pursuant to the provisions of U. S. C. A. Sec. 1291.

Statement of the Case.

The complaints in the two actions sought the amounts paid with interest, as the result of erroneous assessments on the income tax of plaintiffs Mr. and Mrs. Herbert E. Toor, for the years 1943, 1944 and 1945. The assessments were based first upon the assertion that the partnership known as Furniture Guild of California, organized on November 20, 1942, and in which Mr. Toor was general partner, and the Beverly Hills National Bank and Trust Company as trustee of two trusts, the partnership was not a valid partnership for tax purposes.

s was the disallowance of certain deductions Mr. and Mrs. Toor. However, there is no ap-
this aspect of the case.

Mrs. Toor were divorced in 1948, and as part
erty settlement agreement, it was provided that
would be entitled to receive and retain as his
property any income tax refunds, credits or tax
for the years in question [R. 191].

o cases were consolidated for trial and the case
the tax paid by Mrs. Toor (Case No. 10462-Y)
tted and decided on the basis of the testimony
e involving the tax paid by Mr. Toor (Case No.
[R. 499]. For purposes of argument, we will
ases as one.

l court ruled that the partnership was not valid
urposes and that the Commissioner of Internal
properly assessed to the plaintiffs the entire in-
e business upon a community basis.

Presented:

ether the limited partnership should have been
for tax purposes for the years 1943, 1944 and

second question is presented in the event the
stion is answered in the affirmative. The trus-
trustee intended to create an irrevocable trust.
by reason of a clerical error, the irrevocability
s inadvertently omitted from the original trust
ts creating the trusts for the children on No-
1942. The parties confirmed this original in-

of correction of the error, and if the later date whether the income taxes of Mr. and Mrs. Toor affected. This question arising as a result of the error, was not ruled upon by the trial court since it answered the first question in the negative.

Statement of Facts.

(Page references are to the printed record.)

The appellants, Herbert E. Toor and Florence Toor, were married in 1926. Domestic difficulties between them developed prior to 1941, and in that year they ceased to live together as husband and wife although they continued to live under the same roof [R. 96]. Their difficulties culminated in a divorce in 1948 [R. 95]. The principal source of difficulty was the lack of sense of value for business or money on the part of Mrs. Toor and the extravagant thrift manner in which she disposed of money [R. 96].

Because of this difficulty, Mr. Toor in 1941, sought to make provision for their two children, Barbara and Bruce Alan Toor by changing at least one of their life insurance policies to make them direct beneficiaries, and by purchasing United States bonds monthly in their name [R. 96]. In early 1942, the situation had crystallized to the point where Mr. Toor discussed with his attorney, Max Fink, the means by which to get some of the community property out of the control of Mrs. Toor and himself so that the children would have some measure of protection in the event the domestic situation erupted, or in the event something happened to Mr. Toor. A trust was the natural result of this [R. 98, 206, 207].

so as not to expire until after the children were
age and would come into the property themselves

By the terms of the trust agreements all funds
accumulated in the trusts and there could be no
until the trusts terminated, which was after
en became of age. In discussing the trusts, it
suggested that if a separate trustee were ap-
e might be able to invest those funds in Mr.
business which was then conducted as a sole pro-
under the name of Furniture Guild of Cali-
[R. 98].

was adopted for the setting up of a trust for
Mr. Fink talked to the Beverly Hills National
Trust Company, and that bank agreed to accept
eship. Arrangements were also made for the
of a limited partnership of the furniture busi-
the bank, as trustee of both trusts, being the
artner [R. 104]. Prior thereto, Mr. Toor had
acquainted with the bank or its officers except by
; it was not he who suggested the bank as
[R. 286-287].

the program had been arrived at and tentative
ents made with the bank, Mr. Fink and Mr. Toor
with a tax consultant and certified public ac-
concerning the tax aspects thereof [R. 103-104].

of the trust agreements were drawn in July or
f 1942 [R. 298]. After negotiations with the
some revisions in the trusts resulting therefrom,
trust papers were drawn. These were signed on
20, 1942 by the bank and by Mr. and Mrs.

trusts. \$10,500 went into each of the two trusts. The first child, Barbara, was then about twelve years old. The other, Bruce, was then about eight years old. On the same day, Mr. Toor and the Beverly Hills National Bank and Trust Company executed articles of limited partnership and a verified sworn certificate of limited partnership, which documents were first drafted some time before. The original drafts of the trust agreements were [R. 115-127, 299, 232].

In connection with the trusts, the bank in its capacity as trustee, filed donee gift tax returns with both the Federal government and with the State of California on the basis of irrevocable trusts [R. 332-334].

The certificate of limited partnership was filed and recorded, a certificate of fictitious firm name published in the commercial agencies and the bank with which the business had its account were notified, insurance policies were changed, premises for the operation of the business were leased to the partnership by Mr. Toor, employment contracts were executed by the partnership, partnerships were set up, and in general, all acts connected with the setting up of the business as a partnership were [R. 137-160].

In accordance with the partnership agreement, the bank transmitted to the new partnership the sum of \$10,500 as a capital investment for each of the two trusts. Mr. Toor conveyed to the partnership by bill of sale the real estate which was the subject of the trusts.

each contributed \$10,000, making a total capital for the partnership of \$60,000.

Under the terms of the limited partnership agreement, Mr. Toor was to receive reasonable compensation for his services. After consultation with the bank, his salary was fixed at \$3,000 gross sales [R. 290, 338, 364, 367]. It was also provided by the partnership agreement that profits should be shared and distributed in proportion to the investments made by each to each of the trusts, and four-sixths to Mr. Toor. It was also provided that Mr. Toor should have full charge and control of the partnership business and have full power to execute all acts necessary or convenient with respect to the partnership business that a general partner in a limited partnership could do in accordance with the laws relating to limited partnerships. The term of the partnership was to continue until June, 1955; Mr. Toor had the power to terminate the partnership by giving thirty days' prior written notice, after which event he could purchase the interests of the other partners at book value. Assets had also been valued at book value for the purpose of commencing the partnership. Proper partnership books were to be kept and statements were to be prepared annually or more frequently [30-40].

The partnership agreement also provided that the partnership should be retroactive to September 1, 1942. The reason for this was that it was originally contemplated that the partnership should be formed at that time.

of the partnership was not accomplished until November 20, 1942. This retroactive feature in the agreement was subsequently eliminated by an amendment to the agreement so that the agreement and action thereunder would conform to the true situation, and that income earned by the partnership took effect, would not be credited to the partnership [R. 315-316, 388, 405-407].

All business thereafter was conducted in the name of the partnership [R. 169-172]. The partnership had a fiscal year ending June 30th of each year. Books were set up and kept on a partnership basis [R. 388-396]. The books accurately and honestly reflected every business action during the life of the partnership; entries were adequate to disclose the relationship of the partnership and transactions in the books were in the name of the partnership; there were no subterfuges or kickbacks of any kind [R. 388-396, 443-445]. The terms of the limited partnership agreement were in all respects adhered to. Mr. Toor received a reasonable compensation for his services, computed upon three percent of gross sales, which compensation was deducted before the computation of net profits [R. 162, 338].

Mr. Toor managed the business as a general partner. Accountings were rendered to the bank [R. 191-192]. Profits were divided and substantial distributions were made in proportion to the investments [R. 339-353].

Toor, and \$21,443.60 to each trust. On or about 10, 1944, \$60,000 of the profits were distributed, \$40,000 to Mr. Toor and \$10,000 to each of the trusts [R. 339, 343, 344].

For the year ending June 30, 1944, the total net profits of the partnership, after deducting Mr. Toor's salary, were \$91,586.92, of which sum \$91,586.92 was credited to Mr. Toor's capital account, and the sum of \$22,896.37 was credited to the capital account of each of the trusts. On February 1, 1945, \$60,000 was distributed, \$40,000 to Mr. Toor and \$10,000 to each of the trusts [R. 346-347].

For the year ending June 30, 1945, the total net profits of the business after deducting Mr. Toor's salary were \$76,932.43, of which \$66,932.43 was credited to the capital account of Mr. Toor, and \$16,733.11 to the capital account of each of the trusts. On September 6, 1945, \$20,000 was distributed, of which \$20,000 was distributed to Mr. Toor and \$5,000 to each of the trusts [R. 348-350].

The funds in the hands of the trustee were invested from time to time in accordance with the trustee's discretion [R. 344-350].

For the year ending June 30, 1946, the partnership distributed securities having a value to the partnership of \$211,724.03, of which \$161,724.03 worth of securities were distributed to Mr. Toor and \$36,480.21 worth of securities to each of the trusts [R. 351-352].

666.66 worth of assets were distributed to Mr. T. \$16,666.67 worth of assets was distributed to each of the trusts. Concurrently therewith a corporation was organized to carry on the business of the partnership in the name of "Furniture Guild of California, Inc.," capital stock \$100,000 and each of the partners contributed to the corporation their respective shares of the assets of the partnership, other than the securities distributed to the partners as stock in the corporation. The balance of the assets of the partnership, consisting of cash, was distributed to each of the partners in proportion on or about June 30, 1943, at which time the partnership was terminated [R. 352, 389-395; Ex. 25].

At the time of trial Mr. Toor's son-in-law was associated in the business and Mr. Toor stated that he had organized the corporation and thought the partnership arrangement would bring his son into the business [R. 190, 480-481].

The government has disregarded the partnership for its fiscal years for income tax purposes, and has assessed an additional tax liability against Herbert E. Toor and Florence D. Toor based upon the portion of the proceeds of the partnership received by the two trusts for the years ending June 30, 1943, June 30, 1944 and June 30, 1945 respectively.

The facts relating to the issue of the effect of the error in the execution of the original trust in

CATIONS OF ERRORS:

that the Court erred in concluding that the parties
orm and carry on as a partnership, within the
of the Internal Revenue Code, the business
the Furniture Guild of California [Conclusions
to 6].

ne Court erred in making the following findings

ne plaintiff, as manager of the marital community
entered into two trust agreements [Finding
is was erroneous in that the trust agreements
ered into by Mr. and Mrs. Toor and funds con-
trust were conveyed by both.

he Bank as trustee executed articles of limited
ip for sharing in profits [Finding 11]. This
neous because the partnership was created for the
of the business and contemplated, among other
he sharing of profits.

ne trustee was authorized to invest only in the
of which plaintiff was a partner or principal
er, or in government bonds [Finding 13]. This
neous in that the trustee also had the power, in
discretion, to invest part or all of the funds in
ne securities of the United States or the instru-
es or states thereof.

was erroneous in that written confirmation of the intention to create irrevocable trusts was executed on December 14, 1943.

(e) Under the articles of partnership, plaintiff had full charge and control of the entire business, full power and authority to do any act necessary and convenient with respect to the business [Finding 16]. This was erroneous in that the control, power and authority was limited to partnership purposes only, and was limited by the express terms of the partnership agreement and by the provisions of law regarding limited partnerships.

(f) The creation of the limited partnership in 1943 did not in any way change the control which the plaintiff exercised over the business [Finding 19]. This was erroneous in that the financial structure and operation of the business was changed and plaintiff's control was limited by the provisions of the written partnership agreement, by the provisions of law regarding limited partnerships and by his fiduciary duties as a general partner.

(g) The creation and the termination of the partnership subsequent to the taxable years were merely the acts of the plaintiff [Finding 20]. This was erroneous in that the partnership was created and terminated in accordance with the voluntary agreement and independent action of the parties.

of plaintiff's property on which the business
ed on—in brief, the determination of all matters
judgment or management, control of the prop-
disposition and allocation of funds derived from
ess, including amounts to be allocated each year,
exclusively under the domination of the plaintiff
all intents and purposes, the creation of the part-
made no change whatever in the manner in which
ess had been conducted before [Finding 21].
erroneous in that the control by the plaintiff was
than that of a general partner in a limited part-
and was exercised under the limitations and re-
of the written agreement and of the law, and
fiduciary capacity as a general partner, as dis-
d from control for his own benefit only.

o instance appears where the Bank or its repre-
s used independent judgment, and the trustee ex-
one of the rights of partnership, even by way of
Finding 22]. This was erroneous in that the
use independent judgment, did enforce the writ-
ement, did recognize all of its rights as limited
and, under the circumstances, acted in a manner
ould be expected of a limited partner in a part-
omposed of strangers.

ne trustee did not exercise dominion and control
trust corpus in the business and did not influence

in the business, and influenced the conduct of the ship, and enforced the partnership agreement.

(k) To the extent that capital played a part in the earnings of the business, the plaintiff must still be shown to have created the entire business income because of his control over corpus and income and his retention of many of the attributes of ownership of the trust in his business [Finding 24]. This was erroneous in that the control of plaintiff was that of a general partner in a limited partnership and the earnings of the trust were created by the business conducted as a partnership. Plaintiff received a salary as compensation for his services and the bank did contribute capital in proportion to his participation in profits to a business which required substantial risk capital for its operation.

(l) The entire effect of the establishment of the partnership was merely to permit the children of the plaintiff to receive a certain amount of the income when the plaintiff determined that the income was subject to distribution rather than diversion to other business determined by the plaintiff [Finding 25]. This was erroneous in that the income of the partnership went into the trusts; all distributions were required by agreement to be and were proportional to the ownership of the business; the discretion to distribute a portion of the income in the business was not an arbitrary discretion and was a normal and necessary discretion.

the plaintiff and the trustee did not act with a purpose in setting up the limited partnership [26]. This was erroneous in that there was a purpose" as that phrase is properly used; there was no intent and a complete absence of sham or fraud.

The plaintiff and the trustee did not in good faith join together in the present conduct of the business [Finding 27]. This was erroneous in that the circumstances and evidence both direct and indirect showed a good faith intent to join in the conduct of the business as limited partners.

That the Court erred in failing to find on all the factual issues presented. These factual issues are set out under Point IB of the Argument.

That the Court erred in ruling, in effect, that the tests for determining the validity of a family partnership for tax purposes are different from the tests for determining the validity of such a partnership in ordinary cases involving taxes.

The Court erred in ruling in effect, that a family partnership is not valid for tax purposes if no capital or services are contributed by the limited partners.

SUMMARY OF ARGUMENT.

I. There is no evidence to support the finding on which the Court's conclusion as to the invalid partnership is based.

A. The pertinent findings of fact are supported by the evidence.

(1) Both direct and indirect evidence good faith intention to form and carry on business as a partnership.

(2) The control of the business given in the agreement was not complete for all purposes it was for partnership purposes only, was by law, and by the agreement, and were the normally granted a general partner in a limited partnership.

(3) The control exercised by Mr. T changed by the creation of the partnership from the complete freedom of the individual partner to the fiduciary position of general partner with limitations and responsibilities imposed by agreement and by law. This fiduciary obligation recognized and respected at all times by the partners in their conduct.

(4) The partnership was both created and operated by voluntary agreement of the parties at arm's length and using independent judgment.

(5) The bank as trustee did use independent judgment, availed itself of its rights as a limited partner.

available to it that it was called upon to exercise, and to act as would be expected under the circumstances if this were a limited partnership with partners.

Mr. Toor's personal services and skill played an important role in the earning of the business income, but he received a salary for such services which was not unreasonable. The capital and organization of the business itself was the major factor in the earning of the income of the business, and as one of the owners of that capital and organization, each partner's trusts must be considered to have earned one-third of the income of the business over and above Mr. Toor's salary.

The provision that Mr. Toor might determine the times and amounts of distribution of income, did not give him an arbitrary discretion, but one that had to be exercised reasonably for the benefit of the business. It was a common, normal and accepted function of a partner's management to determine when and how much of the income of the business is to be distributed.

The words "business purpose" should not be interpreted to require a benefit to the business. As early interpreted, there was a business purpose in the formation of the partnership; there was no fraud or subterfuge or paper organization; there was an intent to form a partnership and carry on the business as such.

The Court failed to find on all the material is-

Court's ruling that the partnership was invalid for tax purposes, is contrary to law.

A. Principles of law applicable:

(1) If a partnership exists under common law, it exists for tax purposes—the tests are the same.

(2) No different test is applied in determining the validity of a family partnership than in the case of strangers.

(3) No distinction is made between general and limited partnerships for the tax question when the same is involved.

(4) A partnership is an organization for the production of income to which each partner contributes capital or services.

(5) Neither original capital nor service is required for the validity of the partnership.

(6) The desire of a parent to provide for his children is a legitimate motive for creating family partnerships.

(7) The desire to reduce taxes will not affect the validity of a transaction if that is not the sole motive and if the transaction is *bona fide*.

B. Other family partnership cases.

C. An evaluation of the facts of the instant case in the light of the above stated principles.

the clerical error in omitting the irrevocability from the original trust instruments did not result in income from the partnership to be attributed to Mr. and Mrs. Toor or justify the disregard of the partnership for tax purposes.

The facts indicate a true intent that the trusts be irrevocable from the beginning, to wit: November 1, 1942, and that the documents originally signed by Mr. and Mrs. Toor did not contain the irrevocability clause all of the parties believed that they did contain.

The instruments executed December 14, 1943 confirmed the original intention of the parties that the trusts be irrevocable and, in any event, should be considered to be retroactive to the date the error occurred.

Even if the reformatory instruments were not retroactive in effect, the clerical error was corrected before the close of the taxable year of the trusts and Mr. and Mrs. Toor, and the income from the partnership accruing to the trusts in that year is not attributable to Mr. and Mrs. Toor.

The same government accepted the donee's reformation made shortly after the creation of the trusts, on an irrevocable basis; the same government, in renewing war contracts, demanded and received some

ARGUMENT.

I.

There Is No Evidence to Support the Finding of Fact From Which Was Drawn the Trial Court's Conclusion That the Plaintiff Did Not Intend to Carry on the Business in Question as a Partnership Within the Meaning of the Internal Revenue Code.

A. THE PERTINENT FINDINGS OF FACT AND CONCLUSIONS SUPPORTED BY THE EVIDENCE.

(1) Finding 27.

"The plaintiff and the trustee did not in good faith intend to join together in the present conduct of the business enterprise."

This finding itself is a conclusion drawn by the trial court from the other findings of fact [Findings 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000].

Thus, for example, Mr. Brooks, the representative of the trustee bank, who conducted the negotiations in answer to the Court's questions, as follows [R. 98, 201, 336-337, 374-376, 484-485, 487-488, 490-491, 493-494, 496-497, 499-500, 502-503, 505-506, 508-509, 511-512, 514-515, 517-518, 520-521, 523-524, 526-527, 529-530, 532-533, 535-536, 538-539, 541-542, 544-545, 547-548, 550-551, 553-554, 556-557, 559-560, 562-563, 565-566, 568-569, 571-572, 574-575, 577-578, 580-581, 583-584, 586-587, 589-590, 592-593, 595-596, 598-599, 601-602, 604-605, 607-608, 610-611, 613-614, 616-617, 619-620, 622-623, 625-626, 628-629, 631-632, 634-635, 637-638, 640-641, 643-644, 646-647, 649-650, 652-653, 655-656, 658-659, 661-662, 664-665, 667-668, 670-671, 673-674, 676-677, 679-680, 682-683, 685-686, 688-689, 691-692, 694-695, 697-698, 700-701, 703-704, 706-707, 709-710, 712-713, 715-716, 718-719, 721-722, 724-725, 727-728, 730-731, 733-734, 736-737, 739-740, 742-743, 745-746, 748-749, 751-752, 754-755, 757-758, 760-761, 763-764, 766-767, 769-770, 772-773, 775-776, 778-779, 781-782, 784-785, 787-788, 790-791, 793-794, 796-797, 799-800, 802-803, 805-806, 808-809, 811-812, 814-815, 817-818, 820-821, 823-824, 826-827, 829-830, 832-833, 835-836, 838-839, 841-842, 844-845, 847-848, 850-851, 853-854, 856-857, 859-860, 862-863, 865-866, 868-869, 871-872, 874-875, 877-878, 880-881, 883-884, 886-887, 889-890, 892-893, 895-896, 898-899, 901-902, 904-905, 907-908, 910-911, 913-914, 916-917, 919-920, 922-923, 925-926, 928-929, 931-932, 934-935, 937-938, 940-941, 943-944, 946-947, 949-950, 952-953, 955-956, 958-959, 961-962, 964-965, 967-968, 969, 971-972, 974-975, 977-978, 980-981, 983-984, 986-987, 989-990, 992-993, 995-996, 998-999, 1000].

"The Court: Was there any understanding at the time that you entered into this agreement that it was to be merely a partnership, sort of a

e Court: In other words, you understood that, ct to the limited rights you had in the partner- you were actually entering into this partnership, r as those particular trusts were concerned?

e Witness: That is correct.

e Court: And you were to derive whatever its came to the trusts?

e Witness: That is correct. In a fiduciary city."

ord is quite clear that there was no understand- than the agreement executed by the parties in n, dealing at arm's length and using independent and carried out by them to the last letter. s no agreement between Mr. Toor and his chil- rding the disposition of the trust fund at the on of the trusts [R. 201] and it was not even that the bank was a party to any covert agree-

undisputed and uncontradicted testimony of un- d persons may not arbitrarily be disregarded by finder. (*Lawton v. Commissioner* (6th Cir.), l 380.)

all hereinafter further point out in detail that in- concerns all of the indirect evidence from which of the parties may be inferred there is no evi- support a finding that the partnership here con- s a sham, a subterfuge or a mere paper organi-

(2) Finding 16.

"Under the articles of partnership, plaintiff had full charge and control of the entire business, and had full power and authority to do any act necessary or convenient with respect to the business."

This finding is not justified by the evidence. The evidence shows that as a general partner, Mr. Toor had full charge and control of the business for *partnership purposes only*. Likewise, he had full power and authority to do any act necessary or convenient with respect to the business *only for partnership purposes*. We shall hereinafter discuss the distinction between the power of management for personal purposes as compared with the power of management in a representative or fiduciary capacity for the benefit of others. In this case, the power was given for the benefit of the partnership of which the trusts were part owners. Such powers could not be exercised arbitrarily. As a matter of fact the powers given by the agreement were what a general partner would have had out of the agreement.

(3) Findings 19 and 21.

"19. The creation of the limited partnership in this case did not in any way change the control of the business by the plaintiff exercised over the business."

"21. The control of the business income, the manner of its allocation, the salaries to be paid by the plaintiff and the employees, the amount paid for the rental of plaintiff's property, and the way the business was carried on—in brief, the details of the business, were controlled by the plaintiff."

the domination of the plaintiff that, to all in-
and purposes, the creation of the partnership
no change whatever in the manner in which the
business had been conducted before."

findings are also without support in the record.
findings are basically similar, the same evidence
discussed in connection with both of them.

These findings first of all ignore the fact that the
of a general partner in a limited partnership does
not differ from that of an individual proprietor. The control
of the partnership previously had as an individual proprietor
was not limited by his fiduciary obligations as a partner
by the specific limitations prescribed by law (see Secs.
15510 of the Corporations Code of California
and the Appendix hereto). The limitations enunciated
in the statute are not meaningless.

These findings also ignore the fact that the control
of the partnership was given and exercised was simply that of a
partner in an ordinary limited partnership. Find-
ings when analyzed, merely amounts to a finding that
the business was conducted as a limited partnership
with Mr. Toor having the powers of management of a
partner. There is nothing in this that could sup-
port the conclusion that the partnership was not a real one
and that it was invalid for tax purposes, unless a limited
partnership created with gift capital could not be recog-
nized for tax purposes. As hereinafter pointed out, this is
not the law. It is extremely significant that neither this
nor any other finding states that Mr. Toor was

(c) These findings further ignore the difference between control primarily for his own benefit, and control exercisable for the benefit of others—in this case, the benefit of the partnership of which the trusts were third owners.

See:

Armstrong v. Commissioner (10th Cir., 1946),
35 F. 2d 700, and cases cited therein at p.

Greenberger v. Commissioner (7th Cir., 1946),
35 F. 2d 990;

Cf. Thomas v. Feldman (5th Cir., 1946),
35 F. 2d 488, *aff'd in Feldman v. Thomas*, 34
R. 1631.

Whatever powers of management Mr. Toor had as a general partner, he could not exercise them for his personal advantage, but had to act for the benefit of the partnership with a proportionate part of the gains going to the other partners. He was neither the beneficial owner of the corpus nor the recipient of income therefrom.

(d) These findings further ignore the evidence that the business was at all times conducted as a true and bona fide partnership, which evidence also demonstrated that the parties truly intended to enter into the partnership as a bona fide business relationship.

(1) A written agreement was executed; a bona fide

books were set up and properly kept according to business practice for a limited partnership, etc. [R. 60, 338-396, 439, 443]. As far as everyone was concerned, the business was operated as a partnership [R.

There is no evidence that Mr. Toor ever did any derogation of the agreement or of the rights of the partners.

Accountings were regularly furnished the bank; equal distribution of profits were made; Mr. Toor consulted with the bank as to his compensation and kept the bank informed of the conduct of the business [R. 194, 364, 367, 339-353, 294].

Particularly significant was the conduct of the partnership in the handling of the renegotiation problem which arose with respect to sales made to the United States during the taxable years in question. A change in the Renegotiation Act of 1943 increased the amount of exemption from negotiation for the fiscal year ending June 30, 1943, of persons, firms or corporations whose taxable year ended after June 30, 1943. Since the partnership's taxable year ended June 30, 1943, it could not take advantage of this increased exemption. If the partnership was in effect, Mr. Toor could have taken advantage of the increased exemption since his taxable year ended June 31. When confronted with this problem, Mr.

resulted in the requirement that the partnership pay a substantial sum to the government.

(5) There was no mere paper allocation of income as indicated in the case of *Commissioner v. Tower*, 307 U.S. 280, 66 Sup. Ct. 532, 91 L. Ed. 670, 164 A. L. R. 101 (1938). There were no rebates or kickbacks from the income that the partnership allocated to the trusts, none of it was set aside for the benefit of the trustors nor was it available to them. The income was not used to help support the children (pp. 189). All distributions were made in proportion to the partnership (pp. 339, 353). The full ownership of the income invested in the partnership and the income therefrom was at all times in the trust. All benefits accruing to the trusts actually went into the trusts. In this regard the trial court commented as follows [R. 500]:

"I will say this for you: I intimated a possible finding of fact on one point, and I will intimate to you another prospective finding of fact, which is to your advantage, and that is this: that the evidence shows clearly that the estate, the partnership, and the trusts expected at all times the rights and interests of the children in the trusts, and at no time was there any attempt to deprive these children of the benefits coming to them."

The only thing that may appear in the evidence so far is the fact there may be undistributed income, which, of course, it is within the right of a partnership or corporation to distribute at a particular time. In that respect we do not have a paper organization. If it were paper it would have accumulated a great deal of good money of the United States in the trusts of those children over this period of years.

(4) Finding 20.

the creation and the termination of the partnership subsequent to the taxable years were merely the act of the plaintiff."

There was no evidence to justify such a finding. The partnership was created by a valid and voluntary agreement between Mr. Toor and the Beverly Hills Bank and Trust Company, for a valuable consideration. The consent of each party was freely and voluntarily given not only to the creation but also to the continuation of the partnership. The bank investigated Mr. Toor and his business prior to becoming a limited partner and gave the matter the same consideration as it would in making any other investment as a trustee in a trust [R. 336, 337, 374]. The terms of the trust agreement and partnership agreement were worked out by the parties, the bank requiring provisions therein favorable to it and refusing to accept the documents in the form as proposed originally by Mr. Toor's attorney. Mr. Toor had not dealt with the bank or even met its representatives prior to negotiating with them for the trusts and partnership. [R. 304, 286-287].

The bank was also consulted and its agreement was readily obtained for the termination of the partnership and the distribution of the assets and investment in the corporation which succeeded to the business of the partnership. The bank did not feel compelled to make the investment in the successor corporation, and considered the

(5) Findings 22 and 23.

"22. No instance appears where the Bank representatives used independent judgment suggested any action other than that proposed by the plaintiff. The trustee exercised none of the control of partnership even by way of advice.

"23. The trustee did not exercise dominant control over the trust corpus in the business and did not influence the conduct of the partnership or the disposition of its income."

Both of these findings are refuted by the same evidence. The evidence shows that the bank realized that it was actually entering into the partnership and that it was to derive whatever benefits came to the trusts from the operation of the business [R. 376]. After the formation of the partnership, Mr. Toor kept the bank informed of the conduct of the business and consulted with its officers from time to time [R. 194, 294]. The bank discussed with Mr. Toor the fixing of Mr. Toor's compensation [R. 290, 338, 364, 367].

The bank received the annual accountings, reviewed them and felt satisfied. [R. 194, 338, 368, 375-376]. The bank received its proportionate share of all dividends [R. 339-353].

It was recognized that under the limited partnership laws of the State of California, the limited partner could not be active in the management and control of the business. (California Corporations Code, Sec. 1550.) The bank recognized that it had rights under the

investigation of the honesty, integrity and com-
f Mr. Toor, and certainly nothing thereafter
that any further investigation was necessary.
felt, based upon the reports that it received,
ity of Mr. Toor and the obvious success of the
that the management of the business was in
ls, that the trusts were getting everything due
none of their rights were in any way violated
368, 374-376]. This particular issue was sum-
by the questions of the Court itself at the con-
the testimony of Mr. Brooks [R. 375-376]:

The Court: Just one question. At all times you
felt and known that you have certain rights as
ited partner, whether they are defined in the in-
ment or whether they are defined by law?

ne Witness: I did. We recognized that.

ne Court: You recognized that?

ne Witness: Yes.

ne Court: You have not exercised those rights
use you have not felt called upon to exercise
?

ne Witness: That is correct.

ne Court: You felt all the time, in relation to
usiness, the integrity of Mr. Toor, the reports
received, that the management was in safe hands
nothing was going on that would warrant your
king that the trusts were being deprived of what
coming to them, or that any of the assets of the
nership had been diverted to channels not auth-
ed by the agreement or by law? Is that not
?

of any limited partner who was a stranger. unusual to have a limited partner with very little edge of the business. In this case, the business standingly successful, the limited partners were everything they were entitled to and it was obvious none of their rights were being violated. It was expected that the limited partner, even if a would attempt to impose his judgment on that of a general partner even by way of advice.

Even if the bank had done nothing, to say that it had not influenced the conduct of the partnership's disposition of its income is somewhat like saying that a contract does not influence the conduct of the parties because there are no breaches of the contract and is based thereon; it is also akin to saying that a contract does not influence or affect the actions of the parties to it because there are no violations and no breaches therefor.

(6) Finding 24.

"The nature of the business was such that the plaintiff's personal services, business judgment and skill played an important role in the earning of the business income. But to the extent that capital played a part, because of his control over corpus and his retention of so many of the assets, the ownership of the trust corpus in his business and the plaintiff must still be considered to have contributed the entire business income."

Mr. Toor's personal services were, of course, important to the business since he was the sole general

ultation with the bank. There is no finding salary was unreasonable. With respect to this note the following:

Mr. Toor received as salary, \$11,972.83 for the period from November 20, 1942 to June 30, 1943, \$138.22 for the fiscal year 1944, and \$20,579.47 for the fiscal year 1945. [Ex. O; R. 162, 393].

Mr. Toor and Mr. Brooks testified the salary was [R. 161-162, 290, 338].

For the years 1937-1940, Mr. Toor derived from his business an average annual earning of \$14,164, which was his compensation for his personal efforts and [R. 339].

Mr. Toor testified that on that same percentage basis he probably would have made \$25,000 per year for the years in question, had it not been for the extra work they were doing [R. 276-277].

Mr. Toor had previously managed another business as an employee with his compensation based on 3% of gross sales [R. 161]. Mr. Toor also testified he could have obtained a competent executive to perform his duties for the same rate of compensation [R. 339].

The salary was fixed in 1942 when the amounts paid by Mr. Toor by reason thereof were considered as compensation for such an executive in an ordinary commercial venture.

The business was not a one-man business, nor a

was ten or eleven salesmen. In addition, there were a hundred or more production workers plus several employees and office staff [R. 163]. There was a manager, Mr. Coyle, who was a sort of general manager in addition to supervising the office, he took care of great many things including purchasing and sales of sales when Mr. Toor was not there. There was also a production manager, Mr. Parker, who was in charge of production and production employees. There were also foremen in charge of each division of the company [R. 164].

Mr. Toor was away from Los Angeles frequently during this period on various trips. While he was away, Mr. Coyle and Mr. Parker operated the business [R. 165]. Mr. Coyle and Mr. Parker in salary and bonus earned \$10,000 a year [R. 167]. Important decisions were generally arrived at after a conference with the other executives [R. 290-291, 216-217, 238, 240].

The major income producing factor during the war was the organization, inventory and equipment of the partnership owned and paid for. This was particularly true during the war years when the increase in business and profits realized was due to purchases for the United States Navy. These purchases were the result of making acceptable bids and being able to meet the orders. The figures for the bids were worked out by Mr. Coyle and Mr. Parker although Mr. Toor would pass on them. Once the bids were accepted and orders received, it would be largely a production matter.

Upon analyzing this finding, we find that it is the conclusion as to the ultimate result reached. No finding as to the extent of control or that it was any greater than would be the case of a partner in a limited partnership with strangers. This finding thus uses the end result itself (the finding of the invalidity of the partnership) as the means of arriving at the result, and skips over the inquiry and necessary determination of the reality of the partnership to carry on as a partnership. Thus, this finding says: Although income must be taxed to the partner who earns it, we are going to disregard the fact that Mr. Toor was paid a reasonable salary for his services and to treat him with earning all of the income of the partnership business because the partnership is invalid for tax purposes; now, since Mr. Toor must be considered as earning all of the partnership business earnings, and he must be taxed to he who earns it, obviously the partnership is invalid for tax purposes. It is submitted that this is the only logical analysis of the finding. As pointed out, it is not the law that the control of the partnership and exercised by a general partner in a limited partnership is sufficient to render the partnership invalid for tax purposes or make the income chargeable to the partner merely because a family relationship ex-

See: *Lamb v. Smith*, 3rd Cir. 1950, 183 F. 2d 938;

Greenberger v. Commissioner, 7th Cir. 1949, 177

Flandrick v. U. S. (Dist. Ct. So. Calif. 1951), cited in Prentice Hall Par. 725
Cf. Harris v. Commissioner, 9th Cir. 1942d 444 (rev'g 10 T. C. 818).

In this connection the Court in *Greenberger v. Commissioner, supra*, at p. 994 commented:

"It is true the court in *Tower* stated, 301 U. S. at page 289, 66 S. Ct. at page 537, 'The issue is whether the income earned the income,' but the court also stated that the issue depends on whether this husband really intended to carry on business as a partner. If the partnership in the instant case was what we think it was, the income earned was that of the partnership and not that of petitioner. Petitioner undoubtedly was the predominating influence in the conduct and management of the business. The Commissioner overlooks the fact that the partnership paid him a salary of \$45,000 per annum for each of the taxable years for his services rendered."

(7) Finding 25.

"The entire effect of the establishment of the partnership was merely to permit the child plaintiff to receive a certain amount of the income when the plaintiff determined that the income was subject to distribution rather than diversion to the business determined by him."

This finding, as is indicated by its own language, is merely a conclusion. It is respectfully submitted

up to in all respects; it disregards the fact that
s intended to form a partnership and carry on
ss as such, and that they did so; it disregards
that the control over the business and income
y Mr. Toor was different under the partnership
s as an individual proprietor; it disregards the
he income was not under the sole control of Mr.
t would be if he were the sole owner of the busi-
could only use it for business purposes which
portionately benefit the limited partners, and he
distribute it unless proportionate distribution
to the limited partners. Furthermore, though
nd amount of distribution of profits was at Mr.
cretion, this was not an arbitrary discretion, if
tion was exercised arbitrarily, the bank as a
rtner had an appropriate remedy in the courts
Limited Partnership Law.

e: *Greenberger v. Commissioner*, (7 Cir. 1949)
77 F. 2d 990, 993.

t that the finding was intended to be limited to
that Mr. Toor could determine the amounts and
distributions of profits. Here again, we have
provision which in no way would tend to sup-
conclusion that the partnership was sham.

ained by Mr. Toor, there are times when the
e best plowed back into new equipment or ex-
nd there are other times when the profits can be
l; certainly it is the management of the business
ould determine, from the point of view of the

such as we have here, whether it be corporate or otherwise, to retain substantial reserves from profits for business purposes, the amount of which will vary from time to time, and which amounts are left to the discretion of such management. As a matter of fact, Mr. Toor explained that the provision was taken from a former limited partnership agreement that he was generally in effect at that time [R. 323].

We note that it was particularly important for the management to have the determination of how much of the profits to distribute. The business was in the process of expansion; due to war conditions inventories had been substantially reduced and reserves had to be set up to cover increased inventory requirements when normal times returned; large capital demands might be necessitated by sudden government orders, some of which could not be anticipated; that the ups and downs of the furniture business were considerably exaggerated by the uncertainty of war conditions. We note further that before the partnership was organized Mr. Toor had left much of the profits in the business, substantially restricting his drawings [R. 411, 416, 497].

Furthermore, Mr. Toor could not derive any personal benefit from allowing profits to remain in the business other than the gain he would share with the limited partners from the resulting benefits to the business. He could not use the funds for personal purposes and he would have no motive for leaving the funds in the business.

benefit to the business in permitting profits to remain, it was to the advantage of the trusts that one rather than having the trusts invest these government securities at a much smaller rate. As pointed out by the Trial Court, the fact that the partnership did not accumulate idle funds was an indication that the partnership was *not* a paper organization.

(8) Finding 26.

The plaintiff and the trustee did not act with a business purpose in setting up the limited partnership.

The Trial Court misinterpreted "business purpose" as requiring a business benefit.

In the *Culbertson* opinion, the ultimate question to be decided in the family partnership cases was stated to be "whether the parties in good faith and acting with a business purpose intended to join together in the present and future of the enterprise." (Emphasis added.) The court, in this finding, has evidently accepted the plaintiff's contention that a business purpose, as thus defined, means a benefit to the business. Such interpretation is erroneous. To thus interpret the phrase would be contrary to the substance of the *Culbertson* ruling, and would make one factor, the absence of a business purpose, conclusive. It is submitted that the words "business purpose" as used in the *Culbertson* opinion may logically be interpreted only as referring to the reality of the partnership, to carry on the basis as a partnership, and to share

Thus, in the case of *Commissioner v. Tower*, 328 U. S. 280, 66 S. Ct. 532, 90 L. Ed. 670, 164 A. L. J. 101, the Court used these words:

“When the existence of a limited partnership is challenged by outsiders, the question arises whether the partners really and truly agreed to join together *for the purpose of carrying on a business and sharing in the profits or losses* of the business.” (Emphasis added.)

It was this statement which the Supreme Court in the *Culbertson* case, was reaffirming when it used the same language in question.

Accordingly, in a subsequent portion of the *Culbertson* opinion, we find the following language (337 U. S. 169, 69 Sup. Ct. 1215):

“If, upon a consideration of all the facts, it appears that the partners joined together in good faith to conduct a business, having agreed that they would contribute their money or capital to be contributed presently by each partner, and that each contributed such value to the partnership that the community of interest should participate in the distribution of profits, the partnership is sufficient.” (Emphasis added.)

This is the interpretation taken by the Appellate Court in applying the *Culbertson* decision. Thus, in *Commissioner of Internal Revenue* (6th Cir., 1940, 119 F. 2d 246, 254, it is stated:

“The test, of course, is not whether there is a legal obligation on the part of a business man to include his wife and children partners in his business.”

partnerships, cannot be recognized for tax purposes where there was no contribution of original capital. This is not the law.

Smith v. Smith (3rd Cir., 1950), 183 F. 2d 938;
Greenberger v. Commissioner, 177 F. 2d 990;
Theodore T. Stern, 15 T. C. 521;
Wm A. Morris v. Commissioner, 13 T. C. 1020;
Andrick v. United States (Dist. Ct. So. Calif.,
May 15, 1951), cited in Prentice Hall, Par.
72515.

See also *Harris v. Commissioner* (9th Cir.), 175
(rev'g 10 T. C. 818), where the Circuit Court
the Tax Court which had held a family partnership
valid, the children contributing neither original
nor services. The case was remanded for further
decision in conformity with the *Culbertson* case. If
the benefit were a vital requirement, the Circuit
in that case could readily have affirmed the Tax

If properly interpreted, the evidence demonstrates
the purpose in that there was a reality of intent
to form the partnership and carry on the business as such.
) We have already commented upon the conduct
of the business as a true partnership as indicating
the reality of the intent of the parties. In addition,

tributed to the trustee without any strings. Mr. Toor received a salary for his services; control was circumscribed by law and by his character as general partner; his relationship to the corpus of the trusts in the partnership and the income therefrom was changed—he could not touch it or avail himself of it for his own purposes.

(2) The prime moving purpose in the creation of the trusts was not a mere tax saving device. The prime initiating factor was the desire to make adequate, independent provision for the children as the result of Mr. Toor's domestic difficulties and the spendthrift habits of his wife. It was only incidentally that the trust invested in Mr. Toor's business, which was a successful one. Naturally, as the project progressed, the tax aspects were considered. The tax advantage which would accrue was certainly an unwelcome *additional* benefit to be derived from the plan. It is settled that the desire to reduce taxes will not defeat the validity of the trust so long as it is not entered into for the sole purpose of saving taxes.

Chisholm v. Commissioner, 79 F. 2d 14;

Ramsey v. Curry (Dist. Ct., Iowa), 88 F. 2d 967.

(3) Additional factors indicating the real intent of the parties:

(a) Mr. Toor had previously operated the business as a limited partnership in 1935 with his

tion of the partnership for a contribution of \$2500 plus a promise of \$2500 more [R. 93, Ex. 1].

) Mr. Toor had previously made gifts to his children and subsequent to the formation of the partnership continued to make substantial gifts [R. 190].

) In the creation of the partnership, Mr. Toor definitely depriving himself of that portion of income derived from the business which belonged to the trusts. This was a substantial practical deduction in this case. Mr. Toor was a comparatively poor man; his future needs might be very substantial and not adequately taken care of by his earnings; he was not a wealthy man, having severely restricted the amount of his drawings and his manner of living so that he could let the profits ride and develop the business [R. 93, 96, 165]. He did not have adequate reserves so that he could feel secure that he would not in the future need the corpus or income belonging to the trusts. Furthermore, the corpus and income of the trusts would go to the children when they became of age regardless of the situation that might develop between himself and the children during the interim. Thus, for example, he would have no way of preventing the children from turning back the money to Mrs. Toor after they became of age [R. 165]. We note in addition that the partnership was created during the early part of the war when business conditions and future prospects were particularly uncertain. The government orders were about to

**B. THE COURT ERRED IN FAILING TO PRESENT
ALL THE MATERIAL ISSUES PRESENT**

The evidence as heretofore discussed in detail, that all the following facts should have been found by the Court. Each of these facts are material to the determination of the reality of the partnership without contradiction in the record:

(1) That the limited partnership agreement entered into in accordance with the laws of California and in accordance with the provisions of formal documents.

(2) That the trustee at all times after entering into the partnership agreement owned an interest in the business and exercised rights of ownership in respect thereto, including receipts of principal and income therefrom, the receipt and examination of the books and records of operation, and advising with the trustee as a partner.

(3) As a general partner, Herbert E. [Name] had full charge and control of the entire business of the partnership purposes only; the Bank was at all times entitled to exercise the attributes of ownership in the rights of a limited partner with respect to the partnership business and its assets, and to receive a proportionate share of profits as fixed by the partnership agreement.

) That the business was at all times in question
ted as a limited partnership, and in accordance
the partnership agreement.

) That the contribution of capital played an
tant role in the earning of the business income;
the Bank contributed \$20,000 in capital and
bert E. Toor contributed \$40,000 of the total
al of \$60,000; that the sharing of profits was
proportion to the capital contribution.

) That in addition to his proportionate share of
profits, Herbert E. Toor received a substantial
y for his services to the business, which salary
not unreasonable.

) That the partnership effected a substantial
ge in the economic relation of plaintiffs and their
ren to the income in question.

) That Herbert E. Toor neither had the power
r ever made a distribution of profits to himself
out making a proportionate distribution to the
s.

) The partnership and all parties at all times
ected the rights and interests of the trusts, and
e time was there any attempt to deprive the trusts
e children of the benefits coming to them. None
e parties ever did anything in derogation of the

(10) Once the partnership was established the benefits that could go into the trusts actually went into the trusts.

(11) Neither of the plaintiffs could or did receive anything from the income earned by and attributed to the trusts.

(12) There was no understanding that the trusts and partnership agreements were not to be carried out in strict accordance with the provisions of the trusts; there is no evidence of bad faith on the part of the parties.

(13) The parties intended to join together in carrying on a business and share in the profits and losses of the partnership.

(14) That the partners joined together in good faith to conduct a business, having agreed to contribute capital to be contributed presently by each in proportion to the value to the partnership that the contributors would participate in the distribution of profits.

II.

r Application of the Principles, Governing
Determination of the Validity of a Partner-
to the Facts Established by the Record,
ates That the Conclusion of the Trial Court
the Validity of the Partnership Is Contrary
aw.

FOLLOWING PRINCIPLES OF LAW GOVERN
DETERMINATION OF THE VALIDITY OF
PARTNERSHIP IN THE INSTANT CASE.

Partnership Exists Under Commercial Law, It Exists
x Purposes—the Tests Are the Same. The Ultimate
on Is Whether the Partnership Was a Sham or
er There Was a Real Intent to Carry on the Busi-
s a Partnership.

Commissioner v. Tower (1946), 327 U. S. 280,
66 Sup. Ct. 532, 90 L. Ed. 670, 164 A. L. R.
1135;

Commissioner v. Culbertson (1949), 337 U. S.
733, 69 Sup. Ct. 1210, 93 L. Ed. 1659;

Schubert v. Arnold (5th Cir., 1950), 185 F. 2d
913.

connection, we note particularly the following
in the concurring opinion of Mr. Justice Frank-
the *Culbertson* case (337 U. S. 753, 69 Sup. Ct.

seems to me important, therefore, to make

a virtue that they have not for the sake of tax men and women may appear in a guise which the gimlet eye of the tax court is entitled to pierce. There should leave no doubt in the minds of the Taxpayers of the Courts of Appeals, of the Treasury Department, or the bar that the essential holding of the *Tower* case is that there is 'no reason' why the 'general rule' which the existence of a partnership is deemed to create 'should not apply in tax cases where the government challenges the existence of a partnership for its own purposes.' "

In further referring to the *Tower* case, Mr. Justice Frankfurter also states (337 U. S. 750, 69 Sup. Ct. 1171):

"In short, the opinion did not say that family partnerships are not to be regarded as partnerships for income-tax purposes even though they be commercial partnerships; the opinion did not announce hobbling presumptions under the tax law against such partnerships."

It is submitted that the ordinary commercial presumptions of the validity of a partnership are clearly met in the instant case.

(2) There Is No Different Test to Be Applied in Testing the Validity of a Family Partnership Than That Applied in Testing the Validity of a Partnership With Strangers

As stated in the *Culbertson* case, the "existence of a family relationship does not create a status which determines tax questions, but is simply a war of words. Things may not be what they seem."

Code so as virtually to ban partnerships composed of the members of an intimate family group." (emphasis added.)

submitted that the Trial Court here has taken a step that would have been held valid if composed of partners, and ruled in effect that it was sham because composed of the members of a family group.

Is No Distinction Between Limited Partnerships and General Partnerships for Income Tax Purposes, and Limited Partnerships Are Recognized for Tax Purposes.

Greenberger v. Commissioner (7th Cir., 1949), 177 F. 2d 990;

Smith v. Smith (3rd Cir., 1950), 183 F. 2d 938.

Regulations 111, Sec. 29.3797.5 (providing a partnership is classified as a general partnership for tax purposes).

Partnership Is an Organization for the Production of Income to Which Each Partner Contributes One or Both of the Ingredients of Income—Capital or Services.

Commissioner of Internal Revenue v. Culbertson, 327 U.S. 156, 40 S.Ct. 173, 80 L.Ed. 150, 17-1 USTC ¶9501, 14 AFTR 1111 (S.Ct., 1946), *supra*.

Original Capital nor Services Are Necessary to the Validity of a Partnership, the True Test of the Reality of Intent to Carry on the Business as a Partnership.

- (6) The Desire of a Parent to Provide for His Children Is a Lawful and Legitimate Motive for Creating Tax-Exempt Partnerships.

Armstrong v. Commissioner (10th Cir., 1943), 143 F. 2d 700;

Thomas v. Feldman (5th Cir., 1946), 154 F. 2d 488.

- (7) The Desire to Reduce Taxes Will Not Defeat the Validity of a Transaction so Long as the Transaction Is in Good Fide and Is Not Entered Into for the Sole Purpose of Saving Taxes.

Chisholm v. Commissioner, 79 F. 2d 14.

B. OTHER FAMILY PARTNERSHIP CASES

It would serve little purpose to review at length many cases applying the principles set out in the *son* case. However, we respectfully invite the attention to the case of *Greenberger v. Commissioner* (1st Cir., 1949), 177 F. 2d 990. The facts in that case are comparable and the observations in the opinion are particularly pertinent to the facts of the instant case.

In that case, the taxpayer was the main stockholder in a corporation which derived practically all of its income from commissions earned on sales. Prior to the years in question, the taxpayer made a valid gift of the corporation stock to his wife, and later the taxpayer and his wife created irrevocable trusts for the

as formed with the taxpayer as general partner
wife and the trusts as limited partners. Con-
capital was \$10,000. Profits for the years in ques-
\$139,000 and \$140,000 respectively. The Com-
attacked the validity of the partnership and the
t found that no valid partnership existed for
k purposes. The Seventh Circuit Court reversed
Court and found that a valid partnership did

x Court had found that capital was not a mate-
e producing factor in the operation of the busi-
his respect, the Seventh Circuit Court observed
s true that the capital invested in the partnership
pective parties was not large, but the point was
had decided it was sufficient for the needs of
ss in connection with the available income which
rship had. The Tax Court had also found that
nd the trustees did not perform any services for
ess. The Appellate Court observed that the
of the lack of services and the fact that capital
material income producing factor, indicated at
or in emphasis, and that the predominant factor
ood faith and legitimate purpose of the parties
g the partnership.

respect to the government's contention that the
by the rendition of personal services, was re-

the business as a partnership. If the partner bona fide the income earned was that of the partner and not that of the taxpayer. *The Appellate Court pointed out that while the taxpayer was undoubtedly the predominant force in the conduct and management of the business, the Commissioner had overlooked the fact that the partnership paid him a salary for his services rendered during the taxable years.*

The Appellate Court also distinguished the *T. H. Lusthaus* decisions by pointing out that in those cases there was a mere paper allocation of income, while in the case in question, the parents retained no control or control over the property donated and the income from the trust property had been received and invested by the respective trustees in accordance with their trust agreements. It was also stated in this connection that the parents could have successfully maintained a claim against the taxpayer to recover their part of the partnership income had he attempted to take or receive any of it for his own. Further, it was observed that a curious result would be presented if the taxpayer were required to account for and pay a tax upon income which he had no right to receive and which right existed solely and exclusively in the trusts. Accordingly it was held in support of the conclusion of the Tax Court that no valid partnership existed for federal income tax purposes was with

APPLICATION OF THE ABOVE STATED
PRINCIPLES OF LAW TO THE FOLLOWING CIR-
CUMSTANCES IN THIS CASE WHICH ARE WITH-
OUT CONTRADICTION IN THE RECORD, COM-
MIT THE CONCLUSION IN THIS CASE THAT
THERE WAS A REAL INTENT TO CARRY ON THE
BUSINESS AS A PARTNERSHIP.

Mr. Toor had operated the same business as a
partnership with his father-in-law as a limited
partner in 1935.

The prime motive for the trusts and the limited
partnership was something other than tax saving; the
purpose was to make effective provision for the children
and the possible benefit to Mr. and Mrs. Toor.

The bank and its personnel were strangers to
Mr. Toor and dealt at arm's length with him, the bank
made its own decisions based on its own investigations.
There is no evidence that the bank was a mere tool
of Mr. Toor.

The partnership agreement was properly executed
in all respects and to all intents and purposes was
a limited partnership agreement in accordance with
the law. The business was set up and conducted as a part-

The economic relation of the parties were changed
and Mr. Toor's position as a general partner was substan-
tially different from that of sole proprietor.

(b) Accountings had to be rendered.

(c) He was subject to the limitations and obligations imposed by law for limited partners. The bank had corresponding rights and powers.

(d) Income earned in the business by the trusts irrevocably belonged to them, and Mr. Toor could not use it for personal purposes.

(e) Mr. Toor could not make a distribution of profits to himself without making a proportional distribution to the trusts.

(f) The business involved a risk of loss or no gain, and losses would be shared in proportion to the extent of the capital investment; profits were by no means assured at that time.

(6) The business was conducted in accordance with the agreement, and Mr. Toor respected the responsibilities and obligations imposed upon him.

(7) Capital and the existing organization of the trusts were the major factors in the production of income. The trusts had paid for and owned their proportionate share therein. To the extent Mr. Toor's services were counted for income, he was specially compensated for such services by a reasonable salary in addition to his share of the profits. This salary was not found to be unreasonable and all of the evidence showed

ly over what Mr. Toor had been making for
y and profits for the years prior to the war; a
executive could have been obtained to perform
functions for the same rate of compensation;
y was fixed in 1942 when, in an ordinary com-
nture, the amounts received by Mr. Toor would
considered adequate compensation for a com-
ecutive; the business ran without Mr. Toor be-
a good part of the time; the large profits were
e result of the war years and having available
, equipment and organization for the production

e bank at all times observed its duties as trustee
cted the interests of the trusts as limited part-

) The bank reviewed the reports received, was
ied thereby, was satisfied as to the integrity and
ct of Mr. Toor and was kept informed by him
the conduct of the business.

) The bank was at all times aware of its rights
limited partner.

) There is no instance in the record where the
was lax in its duties or failed to take any ac-
that would normally be expected from a limited
er, if this were a partnership with strangers.

suspicion, interference, investigation, criticism for that matter, even the tendering of advice to a limited partner not experienced in the business.

(e) There is no evidence that the banks fully intend to live up to its duties as trustees to protect the interests of the limited partners.

(9) Once the partnership was established, the benefits that could go to the trusts actually went to the trusts. There were no rebates, kickbacks or anything of a mere paper allocation.

(10) Neither Mr. Toor nor Mrs. Toor could benefit from the income earned by the trusts. The income was used to satisfy their obligation or otherwise used for their benefit.

(11) There is no evidence in any respect of fraud on the part of any of the parties.

(12) The parties did join together in good faith to conduct the business, and agreed that the capital contributed by each was of such value to the partnership that the contributors should participate proportionately in the distribution of profits.

III.

ical Error in Omitting the Irrevocability
se From the Trust Instruments Did Not Re-
in Causing Income From the Partnership to
Attributed to Mr. and Mrs. Toor or Justify
Disregard of the Fiscal Year of the Partner-
for Tax Purposes.

st note that the argument under this point as-
e partnership is found to be valid. Furthermore,
e involved under this point of the argument is
ated to the partnership for the fiscal year end-
30, 1943.

A. THE FACTS.

vidence was without contradiction that it was
intended by all parties concerned that the trusts
be irrevocable, and it was understood by the
hereof that the Declarations of Trust so stated.
ssity that the trusts be irrevocable was discussed
and Mrs. Toor by their attorney, Max Fink,
et with their approval. Mr. Toor was also spe-
dvised by a certified public accountant to make
irrevocable. The matter of irrevocability was
ussed with the bank. The first drafts of the
uments contained an irrevocability clause, and
parties noted that clause in those drafts. The
s went through several draft stages, and in the

trust documents were executed with all of the trusts under the impression that they contained the irrevocable clause. [R. 99, 100, 113, 296-306, 320-323, Exs. 18 and 19].

That there was any question as to irrevocability was first discovered when the bank received a letter on September 29, 1943, from the State of California Department of the Controller's Office, pointing out that there was a inadvertent omission of the usual irrevocability clause. This letter was in reference to the gift tax returns submitted to the State of California with the trust instruments as supporting documents. The letter was submitted to Mr. Fink, who considered what action to take in order to correct the error, and consulted other attorneys. Reformation by lawsuit or by agreement was considered, and the latter course was finally chosen. [R. 336, 306-309, 324-326, 174-180, Exs. 20 and 21]. The instruments dated December 14, 1943, which were executed by the bank on January 13, 1944, it was corrected and confirmed by the trustees and by Mr. and Mrs. Fink that it was the original intention of the parties that the trust instruments be irrevocable and that the trust instruments were irrevocable [Ex. 14, R. 176-180].

The above facts are not in dispute. The only question is when the trusts should be deemed irrevocable.

INTENTION OF THE PARTIES ALWAYS THAT THE TRUSTS BE IRREVOCABLE AND TRUSTS SHOULD BE VIEWED ACCORD- Y. THE REFORMATORY INSTRUMENTS OF MBER 14, 1943, IN ANY EVENT, SHOULD BE IDERED TO BE RETROACTIVE TO THE E WHEN THE CLERICAL ERROR OCCURRED.

ne error was a mere inadvertent clerical one is spute. The documents were not the ones the tended to execute. The money was delivered nk and accepted by it irrevocably. This is not n such as was presented in *Gaylord v. Commis-* th Cir., 1946), 153 F. 2d 408, where the docu- the one the taxpayer intended to sign, but be- a mistake as to its legal effect, it failed to his later claimed "intention" and "desire."

role evidence rule, as well as special statutory n thereof has its well established exceptions rough mistake, accident or imperfection in the he written document does not contain the true ng of the parties.

California Code of Civil Procedure, Section 1856;

California Civil Code, Section 1640.

t mentioned section provides that:

When, through fraud, mistake, or accident, a writ- ontract fails to express the real intention of the

... such intention is to be regarded, and the erro-

Contracts may be revised or reformed to reflect agreement of the parties, notwithstanding the States government is a party, and notwithstanding requirements of statute or the Statute of Frauds.

See:

Ackerlind v. United States, 240 U. S. 533.
Ct. 438, 60 L. Ed. 78, and cases cited

So, too, in tax cases a taxpayer is not conclusively bound for tax consequences by a written contract which is executed, where such contract does not reflect the actual situation.

See:

Arthur R. Jones Syndicate v. Commissioner
Cir., 1927), 23 F. 2d 833.

This right to correct a mistake applies to any defect in a written contract whether it is in reliance on common law or statutory requisite.

45 Am. Jur. 601;

22 Cal. Jur. 709.

A contract may be reformed by adding an omission.

Fresno Canal & Irrigation Co. v. Hart,
453, 92 Pac. 1010 (1907);

22 Cal. Jur. 715.

may reform it voluntarily as effectively as if the
on were decreed in an action in equity.

Am. Jur. 637;

A. L. R. 119.

instant case, reformation was not sought from
court nor was an attempt made in any way to
ne action into one for reformation. Plaintiff
that the true original intent should have been
and in any event, the original instruments had
een reformed by documents executed on Decem-
1943. We did not assert that such contention or
reformation would be conclusive on the govern-
the government was, of course, free to attack
ty of the statement of the true original intent
e reformatory instruments. This they did not
pt to do. Whether the true original intent was
d or whether the voluntary reformation accom-
a December 14, 1943, was valid and effective,
sue in this case and properly before the Court.
er of fact, this was the first opportunity for the
to litigate this question with the government.
ot necessary that a court reformation be first
before the trial court in this case could recognize
original intent or the effectiveness of the reforma-
uments. (See Civil Code, California, Sec. 1640.)
formation effected by the instruments should be

give the voluntary reformation the same effect decree, which would be a proper result. Upon the tion of an instrument, the rule is that it relates and takes effect from the time of its original especially as between the parties thereto and a tors at large and purchasers with notice.

45 Am. Jur. 591.

Certainly, the government cannot assert that prejudice or injury would result to it from accord active effect to the correction of the clerical error respect, the government is not in the position fide purchaser for value who has acquired rights of the parties to the instrument sought to be ref

Cf. Baines v. Zuibeck (1948), 84 Cal 483, 191 P. 2d 67.

The government was never misled on account mistake in the slightest degree. On the contrary information the government received would be tax returns filed shortly after the creation of and by these returns the government was notified trusts were irrevocable (pp. 332-333).

If Mr. Toor, prior to December 14, 1943, covered the error and attempted to revoke the would have been the bank's duty as trustee to revocation, to sue for reformation and reformation have been granted. It cannot be assumed that would not perform its duties as trustee. In Mr. and Mrs. Toor did not have the actual power to revoke the trusts and this further distinguishes the

IF NOT GIVEN RETROACTIVE EFFECT, CORRECTION OF THE CLERICAL ERROR ACCOMPLISHED ON DECEMBER 14, 1943, EARLIER THAN ON JANUARY 13, 1944, AS FOUND BY THE COURT. THIS CORRECTION WAS ACCOMPLISHED WITHIN THE CALENDAR TAX-YEAR OF MR. AND MRS. TOOR AND OF THE TRUSTS AND PRIOR TO THE TIME THE GOVERNMENT'S RIGHTS HAD ACCRUED.

Ex. 14 was as follows [R. 70]:

"The trust instruments contain no statement that they were not revocable by the grantors. It was not until January 13, 1944, that there were executed amendments to the trust instruments which stated that they were not so revocable."

Such finding is definitely without support in the evidence. The only evidence is in the instruments themselves which state that they were executed on the date of December 14, 1943 [Ex. 14; R. 177, 179]. The fact that the officers of the bank acknowledged their signatures on a later date is in no way contradictory of this and does not support the Court's finding. As a matter of course, acknowledgment was not even required for the amendments to be effective.

Under the Federal income tax laws, profits accruing to a partnership during its fiscal year are not distributable to the members of such partnership until the last day of the fiscal year of the partnership, at which time they are determined and become ascertainable.

in the case of an individual . . .” Section provides in part that “the net income shall be computed on the basis of the taxpayer’s annual accounting (fiscal or calendar year as the case may be) . . .” Under Section 182, each partner, in computing his net income, is required to include his distributive share of the net income of the partnership, as computed by the partnership under Section 183.

The fiscal year of the partnership ended on June 30, 1942. Each year, the first fiscal year ending June 30, 1941, and Mrs. Toor and the trusts were each on a calendar year basis. Under these circumstances, Section 183 of the Internal Revenue Code becomes applicable, and this section provides:

“If the taxable year of a partner is different from that of the partnership, the inclusions with respect to the net income of the partnership, in computing the net income of the partner for his taxable year, shall be based upon the net income of the partnership for any taxable year of the partnership beginning on, before, or after January 1, 1942, and ending within or with the taxable year of the partner.”

Accordingly, any net income accruing to the partnership during the first fiscal year, would not have been includable as income in the returns of the partners for the calendar year 1942, but would necessarily have been included as income in their calendar taxable year ending December 31, 1943.

Section 166 of the Internal Revenue Code pro-

166 is an exception to the general rule that in-
xable to the recipient, and said section must be
nstrued.

erton's Law of Federal Taxation, Vol. 6, p. 410.

tute does not provide that the trust as an entity
isregarded, nor does it require that a partner-
hich such trust might be a member, must be
d. The trust as well as the partnership are
ve, and the fiscal year adopted by the partner-
be recognized. In this connection see *Hash v.*
oner (1945), 4 T. C. 878 (aff'd. 4th Cir., 152
2), wherein the Court refused to permit the
oner to disregard the fiscal years set up by the
p agreements to which the trustees were parties,
nding that the taxpayers were chargeable with
k on the income from the trusts.

Mr. and Mrs. Toor were on a calendar basis, and
the trusts were held revocable, the income accru-
the partnership to the trusts at the close of the
p fiscal year ending June 30, 1943, would have
included by them in computing their net in-
the calendar year ending December 31, 1943.
the rights of the government from a tax lia-
point did not accrue until the close of the taxa-
to wit, December 31, 1943, and since the cor-
the clerical error was accomplished on Decem-
the government is not entitled to complain of
tion of such clerical error: Mr. and Mrs. Toor

The right to make corrections and adjustments to the close of a taxable year has been clearly established by numerous decisions.

Huntington-Redondo Company v. Commissioner, 36 B. T. A. 116; (1937), 36 B. T. A. 116;

Albert W. Russell v. Commissioner, 35 B. T. A. 602.

D. THE SAME GOVERNMENT ACCEPTED MR. TOOR'S RETURN MADE SHORTLY AFTER THE CREATION OF THE TRUSTS ON AN IRREVOCABLE BASIS; THE SAME GOVERNMENT RENEGOTIATING WAR CONTRACTS, DEBITED MR. TOOR AND RECEIVED SOME \$60,000 BASED ON THE RECOGNITION OF THE PARTNERSHIP FOR ITS FISCAL YEAR WHICH COULD NOT OTHERWISE HAVE BEEN ASSESSED OR COLLECTED.

1. Shortly after the creation of the trusts and the filing of gift tax returns were filed and accepted by the government on an irrevocable basis [R. 332-334].

2. As heretofore pointed out, a change in the exemption law increased the amount of exemption available to individuals, firms or corporations with a taxable year ended after June 30, 1943. Since the partnership's fiscal year ended June 30, 1943, it could not take advantage of this increased exemption. If the partnership were not in effect, Mr. Toor could have taken advantage of this increased exemption. By recognizing the partnership and its fiscal year, the government was unable to renegotiate government contracts of the

regarding discussion has been directed to the income accruing from the partnership at the close of the year ending June 30, 1943. The income accruing on June 30, 1944, for the previous fiscal year, and on June 30, 1945, for the previous fiscal year, of course, accrued to the trusts after the trusts had unquestionably become irrevocable. Such income would thus not be taxable to Mr. and Mrs. Toor in any event.

Conclusion.

In due respect to the learned Trial Court, it is submitted that the decision in the instant case violates the cardinal precept of income tax law, that income shall be taxed to he who earns it. This principle is broken by the decision on two further basic principles, one, that income is attributable to the owner of the property, and two, that income from personal services is attributable to the person rendering the services. There is no reason for applying different principles to partnerships. If an individual makes a bona fide gift of property or of a share of capital stock, the rent or income is taxable to the donee. Similarly, however, if the owner of a partnership interest may have acquired such interest, the income is taxable to him for he is the owner.

In the instant case, the personal services of Mr. Toor were compensated for by a reasonable salary. The balance of the income from the business was earned by the trusts and the trusts were each a one-sixth owner of

first place, the situation is like that of a father up a trust for his son by way of gift, and the trust purchases real property. If the gift is father is not taxed on the income even if he ac the property for the benefit of the child. In t place, the control of Mr. Toor was no more th a general partner in an ordinary limited pa Furthermore, in weighing the effect of the re power upon the *bona fides* of a purported gift o power exercisable for the benefit of others mu tingished from the power vested in a transfer own benefit. To hold that the extent of contro business in the instant case was such as to ch Toor with earning the entire income therefrom i tical effect to rule that a family limited part invalid for tax purposes where original capital is tributed by the limited partners. The Trial C has taken a limited partnership, otherwise valid effect, ruled it invalid for tax purposes becau existence of a family relationship.

In this case, there is no question as to the r bona fides of the gift to the trusts. The trust and beneficially acquired an ownership in the bu the investment of a proportionate amount of cap in, regardless of the fact that the capital orig way of gift. There was no evidence of bad fa soever and all of the evidence pointed to the g of the parties. There was no substantial eviden otherwise than that the parties joined together faith to conduct a business, having agreed that

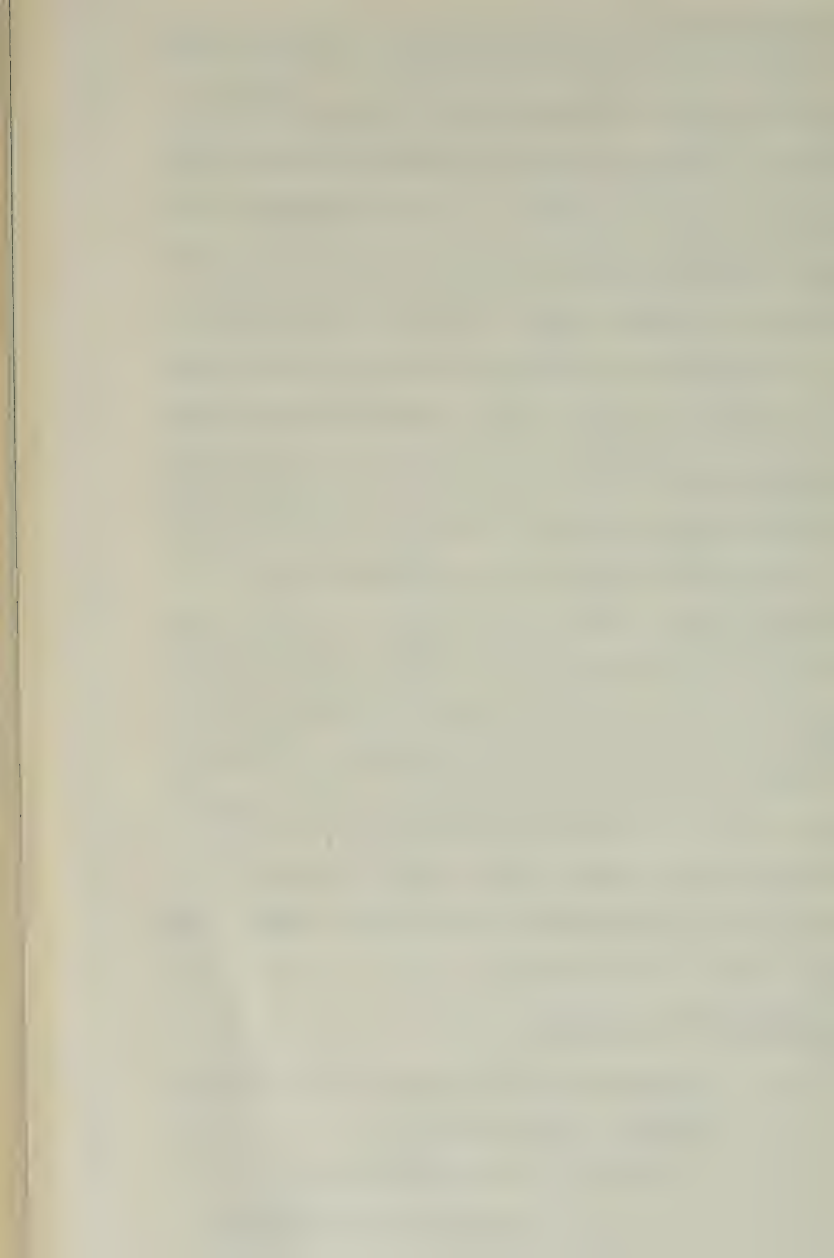
mitted that the decision of the Trial Court has
a result whereby the taxpayer is required to
or and pay a tax upon income which he had no
receive, enjoy, or benefit from, but which right
clusively in the trusts. By a ruling and unsup-
ndings which indicate "at best an error in em-
he Trial Court has judicially legislated the fam-
d partnership formed with gift capital into a
In this case, it is clear that Mr. Toor intended
his particular gift to the trusts to \$21,000; in-
would be forced by this decision to pay in ad-
ne \$200,000, without receiving or being entitled
income upon which it is based. Under all the
e, this result is unjust and contrary to law.

decision of the Trial Court should therefore be
insofar as it concerns the ruling that the part-
as not valid for tax purposes. It should further
that the trusts should be considered irrevocable
r inception, that the fiscal year of the partner-
ld not have been disregarded and that the in-
ributed to the trusts from their partnership in-
ere erroneously attributed to Mr. and Mrs. Toor
the years in question.

Respectfully submitted,

FINK, ROLSTON, LEVINTHAL & KENT,
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Attorneys for Appellants.







APPENDIX.

ations Code of California:

5509. RIGHTS, POWERS AND LIABILITIES OF A PARTNER. (1) A general partner shall have rights and powers and be subject to all the rights and liabilities of a partner in a partnership limited partners, except that without the written ratification of the specific act by all the limited a general partner or all of the general partners authority to:

to any act in contravention of the certificate.

to any act which would make it impossible to the ordinary business of the partnership.

to confess a judgment against the partnership.

to possess partnership property, or assign their rights in partnership property, for other than a partnership purpose.

to admit a person as a general partner.

to admit a person as a limited partner, unless the authority so to do is given in the certificate.

to continue the business with partnership property after the death, retirement or insanity of a general partner, unless the right so to do is given in the certificate.

5510. RIGHTS OF LIMITED PARTNER. (1) A limited partner shall have the same rights as a general partner

to have the partnership books kept at the principal place of business of the partnership.

partnership affairs whenever circumstances render it just and reasonable; and

(c) Have dissolution and winding up by court.

(2) A limited partner shall have the right to a share of the profits or other compensation based on his income, and to the return of his contribution as provided in Sections 15515 and 15516.

Sec. 15523. DISTRIBUTION OF ASSETS. (1) After settling accounts after dissolution the liabilities of the partnership shall be entitled to payment in the following order:

(a) Those to creditors, in the order of priority provided by law, except those to limited partners on account of their contributions, and to general partners on account of their contributions.

(b) Those to limited partners in respect to their share of the profits and other compensation by way of return on their contributions.

(c) Those to limited partners in respect to their share of their contributions.

(d) Those to general partners other than limited partners on account of profits.

(e) Those to general partners in respect to their share of their contributions.

(f) Those to general partners in respect to their share of their contributions.

(2) Subject to any statement in the certificate of partnership subsequent agreement, limited partners share in the partnership assets in respect to their claims for contribution in respect to their claims for profits or for compensation.

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

E. TOOR,

Appellant,

vs.

C. WESTOVER,

Appellee.

E. TOOR and FLORENCE D. TOOR,

Appellants,

vs.

C. WESTOVER,

Appellee.

Appeals From the United States District Court for the
Southern District of California.

BRIEF FOR THE APPELLEE.

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NOV 28 1951



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No. 12999

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

E. TOOR,

Appellant,

vs.

J. WESTOVER,

Appellee.

E. TOOR and FLORENCE D. TOOR,

Appellants,

vs.

J. WESTOVER,

Appellee.

BRIEF FOR THE APPELLEE.

Opinion Below.

Opinion of the District Court [R. 57-63] is re-
94 Fed. Supp. 860.

Jurisdiction.

ly \$104,100¹ in respect of Herbert E. Toor (called the taxpayer). Such deficiencies (together with substantially similar assessments asserted against Florence D. Toor, for the same taxable years 1947 and 1948) were duly assessed by the Commissioner of Internal Revenue [R. 7-8, 14, 22-23], and were paid to the Director of Internal Revenue on or about November 1, 1948. [R. 9, 10, 17, 25.] Claims for refund on or about January 15, 1949 [R. 12, 20-21], were rejected by the Commissioner by registered letter dated August 19, 1949. [R. 12-13, 21, 29.] Thereafter, on October 21, 1949, and within the time prescribed by Section 3772 of the Code, the taxpayer brought suit in the District Court for the recovery of the interest paid. [R. 3-42.] Jurisdiction was conferred on the District Court by 28 U. S. C., Section 1340. Two other actions, involving identical issues, were consolidated with this one for trial, without a jury [R. 55-57], in the District Court [R. 88-89, 499-500.] Judgments for the Collection of the deficiencies were entered on January 11, 1951. [R. 79-81.] Motions for a new trial were filed by the taxpayer and ordered

¹The exact net amount involved is not ascertainable from the record since the District Court, pursuant to stipulation of the parties [R. 64-65], made certain allowances to the taxpayers for certain deductions whereas certain portions of the deficiency assessments were disallowed. 1942-1943.

ons were entered on February 6, 1951. [R. Within sixty days thereafter, and on April 5, taxpayers' notices of appeals were filed in each R. 82-84], pursuant to the provisions of 28 Section 1291.²

Questions Presented.

Whether the District Court erred in finding that d limited partnership entered into between tax- l his two minor children was not valid for fed- ne tax purposes, to the end that all the income business constituted community income charge- ne taxpayer and his wife for the taxable years

ernatively—if the first question is answered in native—whether the court below correctly held two trusts created by the taxpayer and his wife mber 20, 1942, for the benefit of their two minor were revocable, and that the amendments thereto effective on January 13, 1944, and therefore did the original trusts irrevocable as of the date creation.

Statutes and Regulations Involved.

Applicable statutes and Regulations are set forth in ndix, *infra*.

urt, pursuant to stipulation of the parties of July 9, 1951, order on August 3, 1951, providing that *Herbert E.*

Statement.

The pertinent facts as found by the District Court in respect of the two trusts and the family partnership [R. 67-69, 70-73] may be summarized as follows:³

On November 20, 1942, the taxpayer, as representative of his marital community's property, entered into partnership agreements with the Beverly Hills National Trust Company, as trustee (hereinafter called "trustee" or trustee), to create trusts for his two minor children, Bruce Allan Toor and Barbara Lee Toor (Trusts No. 774 and 775).⁴ At the same time, the taxpayer, as bank, as trustee, executed articles of limited partnership for the sharing of the profits of a furniture manufacturing business theretofore operated by the taxpayer under the name of the Furniture Guild of California. The trusts and limited partnership agreements were presented to the bank by the taxpayer as one package. [R. 70.]

Each trust was in the sum of \$10,500. The trustee was authorized to invest the trust funds only in business property in which the taxpayer was a partner or principal or in Government bonds. In each trust deed the taxpayer reserved the power to remove the trustee and appoint another in its place, without limitation. [R. 70.] The instruments contained no statement that they were irrevocable by the grantors. It was not until Jan-

³The District Court findings in respect of several matters pertaining to certain deductions claimed by the taxpayer [R. 76, pars. 32-40] have been omitted for they were not

there were executed amendments to the trust
ts which stated that they were not so revocable.
.]

the articles of limited partnership, the taxpayer
red to be a general partner, and the bank as
as declared to be a limited partner. The part-
as not to terminate until 1955, and the interest
ited partner was also stated to be not transfer-
e taxpayer, however, had the right to terminate
gement upon giving a thirty-day notice of in-
o dissolve it, and he had the absolute right to
the interest of the limited partner at "book"
he taxpayer, under the partnership agreement,
ull charge and control of the entire business, and
power and authority to do any act necessary or
t with respect to the business. While under the
t the business profits were to be divided on the
the ratio of one-sixth to each trust and four-
the taxpayer, he nevertheless had the right to
the profits at such times and in such amounts
etermined. [R. 71.]

ustee contributed neither independent money nor
uring the existence of the partnership. [R. 71.]

ation of the limited partnership did not change
y the control which the taxpayer exercised over

ess. The creation and the termination of the

The control of the business income and the manner of its allocation, the salaries to be received by the partners and the employees, the amount to be paid for the expenses of the taxpayer's property on which the business was carried on—in brief, the determination of all matters requiring judgment of management, control of the business property, the disposition and allocation of funds derived from the business, including amounts to be allocated to the partners, were so exclusively under the domination of the taxpayer that, to all intents and purposes, the creation of a partnership made no change whatever in the manner in which the business had been conducted before. [R. 72.]

No instance appears where the bank or its representatives used independent judgment or suggested anything other than that proposed by the taxpayer. The bank exercised none of the rights of partnership even in the giving of advice. The trustee did not exercise dominion or control over the trust corpus in the business and did not influence the conduct of the partnership or the distribution of its income. [R. 72.]

The nature of the business was such that the taxpayer's personal services, business judgments and skill played an important role in the earning of the business income, to the extent that capital played a part, because of the control over the corpus and income and his receipt of so many of the attributes of ownership of the trust property.

tire effect of the establishment of the partner-
merely to permit the taxpayer's children to re-
tain amount of the income when he determined
income was subject to distribution rather than
to other business determined by him. [R. 72-

xpayer and the trustee did not act with a business
n setting up the limited partnership. [R. 73.]

xpayer and the trustee did not in good faith in-
in together in the present conduct of the business
e. [R. 73.]

e fiscal period November 20, 1942, to June 30,
d for the fiscal years ended June 30, 1943, and
1944, the taxpayer caused partnership income
ns to be filed in the name of the alleged limited
ip, the Furniture Guild of California. As shown,
isted of the taxpayer as general partner and the
a limited partner. [R. 67.]

e years 1943, 1944 and 1945, the taxpayer and his
rence D. Toor, filed federal income tax returns
mmunity property basis for each calendar year.
uded in those returns, among other income, their
distributive shares of the partnership income from
iture Guild of California for the partnership's
rs ending within their taxable calendar years.

sum to the Collector of Internal Revenue. On November 15, 1948, as a result of a deficiency assessed by the Commissioner of Internal Revenue, the taxpayer paid \$32,710.48 to the Collector in partial payment of a total of \$38,639.08 in additional income taxes and interest assessed by the Commissioner for the year 1943.

For the year 1944, the taxpayer reported \$10,000.00 due in income taxes, and in due course paid that amount to the Collector. On or about November 15, 1944, as a result of a deficiency assessment by the Commissioner, the taxpayer paid to the Collector \$27,344.42 in additional income taxes and interest for the year 1944. [R. 67.]

For the year 1945, the taxpayer reported \$10,000.00 due in income taxes, and in due course paid that amount to the Collector. On or about November 15, 1945, as a result of a deficiency assessment by the Commissioner, the taxpayer paid to the Collector \$38,125.80 in additional income taxes and interest for the year 1945. [R. 68.]

On or about January 15, 1949, the taxpayer filed a claim for the refund of the deficiencies, plus interest thereon, for him for the taxable years 1943, 1944 and 1945. On August 19, 1949, the Commissioner rejected such claim. [R. 68.] Thereupon the taxpayer brought this suit on October 21, 1949. [R. 69.]

On the basis of the foregoing facts, the District Court held that the corporate trustee of the trusts created for the taxpayers for the benefit of their two minor children may not properly be recognized as a limited partner in the business; and that the trusts were

Summary of Argument.

This case presents simply another attempt to achieve reallocation of income among an intimate family through the instrumentality of a limited partnership without effecting any change in property control. The question is whether, considering all the facts, the children acted in good faith and acting with a business purpose to join together in the present conduct of a business enterprise. Under controlling law, this question must be answered in the negative. Moreover, upon a proper consideration of the various evidential factors, the District Court found that the taxpayer and his minor children did not enter into a good-faith partnership recognizable for tax purposes. This finding is substantiated by the evidence and is therefore not clearly erroneous. Consequently, the judgment should not be disturbed upon appeal.

The childrens' contributions of gift capital to the partnership, as opposed to independent original capital, do not show that they thereafter exercised no control over the partnership whatever over the capital contributed. Such evidence tends to indicate that no real partnership was formed. Since the gifts were conditioned on reinvestment in the partnership business, they were not complete and unconditional, and therefore the partnership is not genuine. The childrens' inclusion in the partnership as limited partners, when assessed with a view to the other circumstances involved, to indicate that no real partnership was formed.

Similarly, the retention of managerial power over the gift capital by the childrens' father likewise indi-

lack of dominion on the part of the children of the taxpayer's alleged property. Moreover, there is shown no business purpose for the creation of the partnership. The taxpayer's admitted sole desire to help his children as a reason for forming the partnership is a personal desire, and by no stretch of the imagination a business purpose. The taxpayer's desire failed because of the incompleteness of the transfer to the children, the taxpayer, at the time of making the transfer, still having full power to revest in himself title to the property because the trust instruments were not irrevocable. Finally, the taxpayer was fully aware of the tax benefits to be derived by including the children in the partnership. Since the evidence shows that the taxpayer's object of creating the partnership was to diminish the taxable income of the partnership was ineffective for tax purposes.

2. There is no basis in the record for the taxpayer's alternative contention that if the partnership be held to be a partnership then he and his wife should not be held taxable on the income of the trusts now attributed and allocated to the partnership for the fiscal year ended June 30, 1943, and therefore included in their calendar year return for 1943, year, under the applicable statute. Such income was not due to the taxpayer in any event for the year 1943, under the applicable statute, because the trusts were revocable at the time he transferred property to them, and the taxpayer therefore had full power to revest in himself title to the corpus at all times during his taxable calendar

ARGUMENT.

I.

istrict Court Did Not Err in Finding That the
payer Did Not Enter Into a Valid Partner-
With His Two Minor Children for Income
Purposes, and Therefore All the Income
in the Business Constituted Community In-
come Chargeable to Him and His Wife for the
able Years Involved.

istrict Court found that a *bona fide* partnership,
for federal income tax purposes, was not created
by the taxpayer, as manager of the marital com-
munity property, and his two minor children. This find-
ing the Supreme Court has held, is purely one of fact,
and the taxpayer's demonstration that it is clearly
erroneous, it is conclusive. *Commissioner v. Culbertson*,
327 U. S. 733; *Commissioner v. Tower*, 327 U. S. 280;
Commissioner v. Tower, 327 U. S. 293. It was for the
Court to weigh and draw its conclusions from
the evidence, conflicting or otherwise (*United States*
v. Cab Co., 338 U. S. 338, 342; *United States*
Estate Boards, 339 U. S. 485, 495-496); and so
its findings are supported by the evidence and are
not to be clearly erroneous, due regard being given
the opportunity of the trier of facts to judge the credi-

Procedure; *United States v. Gypsum Co.*, 333 U. S. 395-396, rehearing denied, 333 U. S. 869; *Joe E. Brown & Co. v. Commissioner*, 177 F. 2d 867, 873 (C. A. 9th); *Ruud v. American Packing & Provision Co.*, 153 F. 2d 538 (C. A. 9th); *Grace Bros. v. Commissioner*, 170 F. 2d 170 (C. A. 9th)). It is our position that the taxpayer has not demonstrated that the District Court's findings are clearly erroneous, and, furthermore, that he has not shown so for there is ample evidential support for its findings.

We contend that the facts of this case show that the device designed to achieve a paper reallocation of income among an intimate family group, without effecting any change in the control of the property which produces the income or in the real economic position of the taxpayer. Moreover, the taxpayer's simultaneous partnership and trust agreements were ineffective for income tax purposes to the end that any of the business income which was turned over to the trusts remained taxable to him. He retained so many of the attributes of ownership in the trust assets in his business that he must still be considered to have created the entire business income, which is taxable to him who earns it. Cf. *Lucas v. Earl*, 281 U. S. 111; *Burnet v. Leininger*, 285 U. S. 136; *Helfferich v. Clifford*, 309 U. S. 331; *Helvering v. Horst*, 303 U. S. 112; *Helvering v. Eubank*, 311 U. S. 122; *Helvering v. Schaffner*, 312 U. S. 579; *Helvering v. Stuart*, 317 U. S. 154, rehearing denied, 317 U. S. 602; *Commissioner v. Estate of*

412-413 (C. A. 9th); *Eisenberg v. Commissioner*,
2d 506, 510-511 (C. A. 3d), certiorari denied,
S. 767.⁵

tion of the present case depends in particular
principles enunciated by the Supreme Court in
Commissioner v. Tower, *Lusthaus v. Commissioner*, and
and more recently in *Commissioner v. Culbertson*,
v. In the *Culbertson* case, consistent with the
of the *Tower* and *Lusthaus* cases, the Supreme
d (p. 742) that in testing the reality of a part-

question is * * * whether, considering all
facts—the agreement, the conduct of the parties
execution of its provisions, their statements, the
mony of disinterested persons, the relationship of
parties, their respective abilities and capital con-
ditions, the actual control of income and the pur-
poses for which it is used, and any other facts throw-

Partnership in Tax Avoidance, 13 George Washington L.
142-143 (1945):

we would truly orient the subject under discussion, we
d recognize that the family partnership problem cannot be
ssfully treated as a local disease. Family trusts, family
erships, family corporations, are in one sense all the same

They all may seek to reduce taxes by splitting, postpon-
or otherwise controlling the receipt of taxable income with-
substantial surrender of dominion by the person who
d otherwise have to pay the tax. They may not change
omic status, but merely present different facades. Substan-
ownership, business, the operations of daily life, may go on
ore. Lawyers who put aside their special interest as advo-
and their inherent fondness for legal subtleties, know
his is so. Taxation will not be the practical method of

ing light on their true intent—the parties
faith and acting with a business purpose int
join together in the present conduct of the en

This question, the Court said (p. 743), is one of
fact for the trial tribunal. While no one circum
conclusive, nevertheless (p. 744)—

Unquestionably a court's determination
services contributed by a partner are not "v
that he has not participated in "management
trol of the business" or contributed "original
has the effect of placing a heavy burden on
payer to show the bona fide intent of the p
join together as partners. * * *

The Supreme Court also indicated (p. 747) th
family partnerships are subject to special scrutiny
purposes, an intra-family transfer of business cap
render the transferee the true owner and therefor
partner in the tax sense, "if" he exercises active "
and control" over the property, "and through tha
influences the conduct of the partnership and the
tion of its income." Throughout its opinion, the
Court reiterated the principles it had previously en
in the *Tower and Lusthaus* cases, *supra*. The rat
its decisions in all three cases is that the Tax Cou
obliged to accord tax effect to a family partne
rangement which produces no substantial chang
creation of the business income, but merely a rea
of it within the family, even though the arrang
valid under state law and as to third parties.
reaffirming the principles laid down in the *Tower*

t's holding that the husband, through his ownership of the capital and his management of the business, actually created the right to receive and enjoy benefit of the income and was thus taxable upon entire income under Sections 11 and 22(a). In this case, other members of the partnership cannot be considered "Individuals carrying on business in partnership" and thus "liable for income tax . . . in their individual capacity" within the meaning of Section 181. * * *

principles laid down by the Supreme Court in the *Lusthaus* cases, and reaffirmed in the *Culbertson* cases, have been applied many times by this Court and the Courts of Appeals. See, e. g., *Giffen v. Commissioner*, 190 F. 2d 188 (C. A. 9th); *Nordling v. Commissioner*, 166 F. 2d 703 (C. A. 9th), certiorari denied, 332 U. S. 817; *Batman v. Commissioner*, 189 F. 2d 107 (C. A. 5th), certiorari denied November 13, 1951; *Wright v. Commissioner*, 189 F. 2d 856 (C. A. 5th); *Wright v. Commissioner*, 161 F. 2d 495 (C. A. 5th), certiorari denied, 332 U. S. 810; *Feldman v. Commissioner*, 186 F. 2d 87 (C. A. 4th); *Ritter v. Commissioner*, 174 F. 2d 377 (C. A. 4th); *Morrison v. Commissioner*, 177 F. 2d 351 (C. A. 2d); *Morano v. Commissioner*, 175 F. 2d 555 (C. A. 3d), certiorari denied, 332 U. S. 904; *Barrett v. Commissioner*, 185 F. 2d 100 (C. A. 1st); *Denison v. Commissioner*, 180 F. 2d 100 (C. A. 6th), certiorari denied, 340 U. S. 817; *Appel v. Commissioner*, 161 F. 2d 121 (C. A. 6th); *Kohl v. Commis-*

Following the foregoing pronouncements Supreme Court in the *Culbertson* case [R. 58] court below examined the pertinent facts [R. 60] thereupon found that no valid partnership between taxpayer and his two minor children had been [R. 73.] We submit that this ultimate finding is amply supported by the evidence and is therefore correct.

In the first place, we think that the issue is controlled by this Court's recent decision in *Giffen v. Commissioner*, 391 U. S. 190, 19 F. 2d. 188, the factual situation of which was substantially on all fours with that here, with minor exceptions. There this Court refused to recognize the taxpayer's minor children as real partners, and held further that the conditional gifts made to them by the taxpayer and his wife did not relieve the donor of his liability on the income from the partnership. In the present case, the taxpayer's wife was appointed guardian of the property, both the taxpayer and his wife having made gifts of undivided interests in the property to the children. The gifts were expressly conditioned upon their participation in the limited partnership comprising all the family members. The ten-year limited partnership agreement gave the husband full possession and exclusive control and management of the property, as well as the right to retain all income. The limited partners' interests were not assignable. This Court concluded that the

but merely contingent interests that might become after ten years. The Court found no business, no contribution of services by the children, and no capital investments by them. Accordingly, the Court did not recognize the children as limited partners, and the gifts as valid, and it therefore held that the income from the property was taxable equally to the taxpayer and

the District Court, in arriving at its conclusion, applied the foregoing principles enunciated by the Supreme Court, this Court and the other Courts of the Circuit in like or similar situations. Thus, an examination of the District Court's opinion, in the light of those cases, discloses that in concluding that no good-faith partnership was formed with respect to the taxpayer's business, it relied upon the following factors: As limited partners, the children were not intended to and never performed any vital services for the business; nor did they contribute any independent capital, any new capital that was not previously in the taxpayer's business. The money they contributed was given them only upon condition that they invest it in the so-called partnership business of the taxpayer, or in Government bonds. The entire management of the partnership business and affairs was left in the taxpayer's hands, just as before creation of the partnership, and the children in no way participated in the management and control of the business or over the property or income, which was ostensibly given them. The gifts were not absolute and complete because the condition placed thereon stripped the children of freedom

amendment on January 13, 1944; therefore, it follows that the taxpayer never divested himself of the property, possibly given the children in trust on November 2, 1943, and the taxpayer could have revested title in himself at any time in the interim. *Gaylord v. Commissioner*, 31 F. 2d 408, 414 (C. A. 9th).

Nor could the children, as limited partners, exercise any interest they had in the partnership [R. 38, 100] and they could sell it only to their father at "book value" [R. 37-38, 62.] Their father alone had complete management and control over the property [R. 37] and the sale and disposition of all the partnership assets and liabilities. He could dispose of them at any time he saw fit before creation of the partnership. He was not empowered to terminate the partnership arrangement without thirty days' notice of intention to dissolve and he had an absolute right to buy out the children's interests at any value at any time. [R. 37-38, 62, 71.] While partnership profits were distributable in the ratios provided in the partnership agreement, nevertheless the father had the sole right to determine whether the partnership property was to be accumulated or distributed, and at such times and in such amounts as he should determine. [R. 38, 61-62.]

While the District Court recognized that limited partners are restricted in the extent of their participation in partnership affairs, it pointed out that the taxpayer and children never exercised *any* of the rights of a partner, such as voice in the management and disposition of the partnership property and the income therefrom [R. 61-62] and at no time contributed anything

of the partnership income. [R. 71-72.]⁶ More-
children are not shown to have enjoyed much
fruits of their supposed investment of \$10,000
and the sums paid for the trustee's administration
and income taxes. [R. 189, 288.] The record
that the taxpayer, with ample resources (cash
resources) available for the purposes, actually made
contribution" of partnership profits to any of the
during the first period from the inception of the
partnership in November, 1942, to the end of its first
year on June 30, 1943. [R. 412; R. 419, Ex. J.]
Further, he distributed to each trust, in excess of the
necessary to pay the trust fees and income
taxes only \$1,295 up to June 30, 1944 [R. 415; R. 419,
Ex. I]; \$6,822 up to June 30, 1945 [R. 416; R. 421, Ex.
H]; a distribution of only \$7,500 for each trust, out
of which the trustee had to pay more than \$6,100 for taxes
and fees, up to the year ended June 30, 1946 [R. 419,
Ex. K.] On the latter date *after the tax-*
payments, however, he distributed sums in excess of
the necessary to pay the trust fees and income
taxes to each trust [R. 419, Ex. J], one month before
he transferred the partnership business to a corporation he
incorporated in exchange for its stock [R. 184-189, 196, Exs.
G; R. 419, 421, Exs. J and L; R. 498-499.] The
taxpayer, having complete and exclusive power of alloca-
tion and disposition of the income from the business, in-

In connection, we submit that the fact that the children were
only as *limited* partners without possibility of contribution
of additional capital for, as shown, it still belonged to the tax-
payer, and without contributing anything in respect of dominion

cluding any amounts allocated as profits for ea
[R. 36], used most of the income in his business
sequently little for the childrens' trusts. [R. 4
417.]

The taxpayer did intend to make provision
children for the future by transferring property
for their benefit [R. 103, 117-127, 190], provide
ever, that the trustee should become a limited
and invest the trust corpus in the business, or in
ment bonds. [R. 118-119, 370.] This was acco
by the creation of the trusts and formation of t
nership on the same day, as part of a single pla
30-42, 70; R. 106, Ex. 2; R. 317-320.] The
however, was not given any opportunity to in
corpus of the trust in Government bonds for the b
given the gift in trust together with the partnersh
ment, both "as one package." [R. 70, 370-371.]
the same time, the taxpayer, in making the t
limited partner, retained full control over the ent
ness property and income, including the trust inv
to the exclusion of the bank and all others. [R.
A, par. Eighth; R. 481-485.] He made doubly
of this by retaining the power to substitute
trustee, not excluding himself, or to discharge the
trustee at any time, if necessary, for reasons of
[R. 122-123, Ex. 4, par. Ninth.]

e taxpayer testified that he could recall no such [R. 289.] A business purpose behind the formation of a partnership is required, however, by *Commissioner v. Culbertson*, 337 U. S. 733. Contrary to the business purpose claimed by the taxpayer now (Br. 10), the District Court found [R. 73] that the taxpayer's trustee did not act with a business purpose in setting up the partnership. The taxpayer himself testified [R. 190] that he could not recall anything about when they entered into this agreement, [as to] how the limited partnership would benefit the business, in any way," or that there was any "purpose in entering into this agreement, of any kind for the business in any way." To determine what is required by the requirement of a business purpose requires a little definition. The words and the requirement are: "Does the transaction serve the business, or is there any relation to it?" *Slifka v. Commissioner*, 182 F. 2d 722 (C. A. 2d); *Gregory v. Helvering*, 293 U. S. 465, 55 S. Ct. 294, 70 L. Ed. 474.

The so-called partnership transaction herein does not serve the business in any respect; the taxpayer's business went on, just as before, completely in the hands of the same proprietor. The taxpayer's "sole purpose" was to "take care of the children," as he testified [R. 190], which, though laudable, is a *personal* purpose—not a business purpose by any stretch of the imagination. *Hash v. Commissioner*, 152 F. 2d 722 (C. A. 4th), certiorari denied, 328 U. S. 838, rehearing denied, 328 U. S. 870.

that the taxpayer was aware of the tax benefit derived by himself upon including the children in the partnership, and that "the conclusion is warranted that the sole object was to diminish tax liability" thereby. *v. Commissioner, supra*, p. 346. As *Miller v. Commissioner*, 183 F. 2d 246, 254 (C. A. 6th), demands that we examine the transaction to see if any benefit resulted to the business. Clearly, in the present case, no such benefit is shown to have resulted to the business by the inclusion of the children in the partnership. Nor did the children of the partnership *add* anything to the taxpayer's business or make any change in any way in the manner in which he had conducted it before. [R. 61, 71.]

Upon all these considerations rests the District Court's ultimate finding that there was no intention to create a real good-faith partnership between the taxpayer and his minor children to join together in the present conduct of the business enterprise. [R. 73.] *Commissioner v. Culbertson, supra*. We submit that the factors considered by the court as to which there can be no dispute—are ample to support the District Court's conclusion and, as shown, are consistent with the Supreme Court's indication in the *Tower*, *and Culbertson* cases should be considered in reaching the issue before it.

In the light of the foregoing, we submit that the District Court's decision is unassailable. The taxpayer, however, argues incongruously that there is "no" evidence in support of nine of the District Court's primary findings of fact from which it drew its ultimate finding [that the taxpayer and the trustee did not in

ip for income tax purposes.⁷ (Br. 20-44.) We
ady shown, however, that most of the indicia of
tnership recognizable for tax purposes, as ruled
preme Court in the *Tower*, *Lusthaus* and *Cul-*
ases, are absent here. The taxpayer relies on the
cial's testimony [R. 376]—that he understood
children “actually” entered into the partnership
ever benefits they might derive through the trusts
partnership business—as a criterion of the good-
tnership. (Br. 20-21.) In refutation thereof,
the trustee's representative also testified [R.
answer to the question whether it was “your
at the time you entered into this agreement to
arry on the furniture business with Mr. Toor
r make an investment in this business,” that “It
vestment”; also [R. 371], as to whether “you did
ove specifically * * * the entry into the
ip, but regarded the partnership investment as
al asset of the company, accepted by your trust
” he replied that “It was considered * * *
ackage.” This, we think, disposes of the con-
at the children contributed capital to the partner-
43), for the court below found that the trustee

re given by the taxpayer as being present here in support
entions, as follows: business purpose in the formation of
rship; contribution of capital; the rights of the bank-
limited partner (Br. 42) “at all times * * * to exercise
es of ownership and the rights of a limited partner with
he partnership business and its assets, and to receive its
te share of profits as fixed by the agreement”; substan-
in the economic relationship of the taxpayers and their

contributed neither independent money nor service [R. 71], and the evidence shows, in harmony that the funds put into the partnership by the trusts were admittedly merely "an investment." Whatever weight may be given to the children's contribution as a factor, therefore, is negated by the fact that their gift-property still belonged to the taxpayer, as shown, but also by virtue of the retention of absolute dominion and control over the business and the income thereof, to the end that *he* may be considered as the real earner of all the business, as the court below found. [R. 72.]

The taxpayer argues (Br. 28-30), in effect, that the District Court, in finding no contribution of the children, loses sight of the fact that they could make but no contribution because of their status as limited partners. It states that the trustee, recognizing the restrictions on the respect of limited partners under California law, never exercised its rights to which it was entitled because the management of the partnership business being entirely in the hands of the taxpayer, they never felt called upon to do so. (Br. 28-30.) As we have suggested, the mere fact that the children were taken into the partnership as limited partners tends to indicate that they were intended to be members of a good-faith partnership. See *fn. 1*. If, because they are limited partners, they are to be denied any contribution whatsoever save their nebulous contribution of capital, then we submit that in view of the fact that their capital contribution, they have contributed to the partnership and therefore cannot be considered partners in

that income must be taxed to him who earns
Commissioner v. Culbertson, 337 U. S. 733, 739-740.
by itself, the right of the general partner to
that will the interest of the limited partners may
state that no real partnership has been created,
court below noted this provision of the partnership
not only as one of the many factors spread before
[2, 71.] In combination, however, with the total
dominion in the children over their so-called capital
portion [R. 71-72], we submit that the provision for
by the managing partner is confirmatory of the
Court's ultimate conclusion [R. 73] as to the
of *bona fides* of the partnership arrangement.
United States, 176 F. 2d 651 (C. A. 6th).

settled that the alleged partners must make some
contribution, either of labor or capital, for if they con-
tribute nothing it can hardly be contended that they are
any responsible for the production of the partner-
ship income. *Commissioner v. Culbertson*, *supra*, pp.

Although the Court in the *Culbertson* case
held that a donee of intra-family capital could
become a partner through investment of that capital, the
Court limited this recognition by stating (p. 747):

the donee of property who then invests in the
partnership exercises dominion and control
over that property—and through that control influ-
ences the conduct of the partnership and the disposi-
tion of its income—he may well be a true partner.
Whether he is free to, and does, enjoy the fruits of
partnership is strongly indicative of the reality of

receives any of the fruits of the partnership, such strongly indicate that there was no real partnership is precisely the situation here. Whether there is participation in management and control is a question of importance, just as the contribution of capital and its importance may be. *Commissioner v. Culbertson*, *supra*, p. 10. The same is true as to whether the alleged partner receives any of the fruits of the business.

As the decisions recognize, if a family partnership is bottomed upon gift capital, as here, there must be a completed gift. That gift must also be unconditional. *Commissioner v. Tower*, 327 U. S. 280; *Green v. Commissioner*, 177 F. 2d 990 (C. A. 7th); *Culbertson v. Commissioner*, decided August 2, 1950 (1950 F. 2d 1000, Memorandum Decisions, par. 50,187), pending before the Court of Appeals for the Fifth Circuit. The Tax Court apparently disregards the condition imposed upon the gift to the children here, but the condition is in fact a condition. There was to be no gift unless it was reinvested in the alleged partnership. [R. 70.] The entire capital of the children was encumbered with that obligation. The capital base cannot, we submit, bottom a bona fide partnership, certainly not when it is the sole contribution to the children. The Tax Court refused to recognize the contribution of gift capital in the *Tower* case, *supra*, where the husband-taxpayer there gave capital to his children on the condition that she reinvest it in the business. The conclusion of fact was affirmed by the Supreme Court. Where the controls are retained by the grantor under the partnership, as here, the capital invested in his business, even without

Commissioner, 153 F. 2d 408, 412-413 (C. A. Section 29.22(a)-21 of Treasury Regulations promulgated under the Internal Revenue Code. In *v. Commissioner*, 161 F. 2d 506 (C. A. 3d), denied, 332 U. S. 767, the court stated (pp.

The Tax Court in this case evidently concluded the gifts in trust were not complete. We do not know how large a "bundle of rights" the petitioners retained; it is sufficient that the rights retained enabled them to make distributions to the minor beneficiaries according to their discretion, and to continue to use both the corpus and the income of the trusts in their partnership business exactly as though they were the owners thereof, without right in the beneficiaries to receive any distribution until the termination of the trusts as hereinbefore mentioned. Petitioners contend they could have prevented distribution of income from the trusts only by denying distribution to themselves. The effectiveness of this argument may be doubted in the light of the fact that under the terms of the partnership agreement, to which the trusts were subservient, petitioners could adjust their salaries as they saw fit and siphon off all net income from the partnership by executing a written agreement on or before the first of each year.

The taxpayer contends that once the partnership was established all the benefits possible went into the partnership; neither the taxpayer nor his wife benefited from the income earned by and contributed thereto. (Br. 44.)

The court below found, however, that the effect of the

subject to distribution rather than to diversion of business as determined by him. [R. 72-73.] The record shows that the partnership profits were "distributed at such time, and in such amounts, from time to time, determined" solely as the taxpayer might see fit [R. 36], and that he had full authority if, as and when "convenient * * * limitation" to do so, except only as circumscribed by laws pertaining to limited partnerships. [R. 36.] As shown, the children enjoyed very little real benefit from the large profits of the partnership, over and above the amounts of the bank-trustee's administration costs in maintaining the trusts, as well as to pay the taxes. [R. 189, 412, 415, 416; R. 419, Ex. J.] The taxpayer testified [R. 288], contrary to his previous statement (Br. 44), "I don't think we distributed any income" due the trusts during the taxable years. *See* *Commissioner v. Culbertson, supra*, p. 747.

Finally, the taxpayer contends that the formation of the partnership effected a substantial change in the relationship of the taxpayers and their children to the income in question. (Br. 43.) The court believed [R. 72-73], however, that the creation of the partnership changed in no way the taxpayer's absolute control exercised over the business, or the manner in which the business had been conducted by him before the partnership was formed [R. 61, 72], and that the only difference was that it permitted the children to receive some of the income whenever the taxpayer might decide that there

ment, during the taxable years at least [R. 189, 415, 416; R. 419, Ex. J], and only as he saw [R. 72-73.] As the court below found [R. 72], to the extent that capital played a part in the business, nevertheless because of all these things the taxpayer must still be considered to have created the entire income." Cf. *Commissioner v. Sunnen*, 333 U.S. 490-606, where the Court pointed out that the issue is not whether the taxpayer actually receives income which he provides for his children and members of the family group but that the crucial question is "whether the taxpayer retains sufficient power and control over the property or over receipt of the income to make it proper to treat him as the recipient of the income for tax purposes * * *, the receipt of income by the assignee being the fruition of the assignor's economic

power. We submit that the foregoing effectively negates the taxpayer's final argument that the proper application to the facts here of the principles governing the validity of partnerships as enunciated by the Supreme Court in *Wright* and *Culbertson* cases, allegedly indicates that the decision of the court below as to the validity of the partnership, is contrary to law. (Br. 45-54.) That contention appears wholly concluded by the Supreme Court's decision in *Giffen v. Commissioner*, 190 F. 2d 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

The Taxpayer Was Taxable Upon the Trusts While the Trusts Were Subject to His Revoke.

Alternatively, in the event this Court should find the taxpayer's partnership to be valid for tax purposes, the taxpayer contends further that the trustors and trustee intended the original trust instruments to create revocable trusts on November 20, 1942, but that because of a clerical error the irrevocability clause was tentatively omitted therefrom as drawn up on that date, and that thereupon the parties corrected the mistake retroactively by confirmatory documents executed on January 14, 1943, so that the trusts should be considered revocable from their inception; hence, he urges that the taxpayer and his wife should not be held taxable on the income of the trusts now attributed and allocated to the partnership for the fiscal year ended June 30, 1943. (Br. 55-63)

The District Court, upon ruling that the partnership agreement was not effective for tax purposes, held [Br. 62-63] that—

the trust as originally created was revocable and that the amendment to the instrument which became effective on January 13, 1944 could not be retroactive to the past so as to make the original instrument revocable as of the date of the trust's creation. For tax purposes we must take the instrument as it stands, and as stated at the trial, we can not take the action into an action to reform an instrument. *Gaylord v. Commissioner*, C. A. 9, 1946, 157 F.2d 841, 845.

record shows that the trusts, as originally executed, contained no provision making them irrevocable [17-127]; hence, the taxpayer had the power to terminate them, under California law. Section 2280, Deceased Taxpayer's California Civil Code (1949) (Appendix, *infra*); *Commissioner*, 153 F. 2d 408, 412-413 (C. A. 9, 1946). The record also shows that by the instrument dated September 14, 1943, but not notarized by the trustee until January 13, 1944, the trusts were made irrevocable as of that latter date. [R. 176-180, Ex. 14.] The real discrepancy in the dates is not clear but since the taxpayer introduced no testimony to explain it, it must be assumed that he drew up and signed the document on the earlier date, and thereupon sent it to the trustee who was to execute it until the later date, as shown hereinbefore. Thus, the trustee quite clearly did not approve the trusts until January 13, 1944. [R. 177, 179.]

Section 666 of the Internal Revenue Code (Appendix, *infra*) provides that where at any time the power to revoke or to transfer title to any part of the corpus is vested in the grantor, either alone or in conjunction with any person having a substantial adverse interest in the disposition of the corpus or income, then the income from such part shall be included in the grantor's net income. In view of the taxpayer's arguments to the contrary, the income from such trusts was taxable to him.

Therefore, whatever the intention of the parties, the trusts could not have retroactive effect as far as

exercise it. *Gaylord v. Commissioner, supra*, pp. 1090-1091. *Krag v. Commisisoner*, 8 T. C. 1091. Cf. *Eisner v. Commissioner*, 161 F. 2d 506, 510 (C. A. 3d), cert. denied, 332 U. S. 767; *Daine v. Commissioner*, 141 F. 2d 449 (C. A. 2d). This reinforces our earlier conclusion that it was the property of which the taxpayer divested himself of control at the time of the gift. He put into the partnership in behalf of the trust. Clearly, the trustee did not have, even technically, at the legal instant, the true ownership of the assets. The taxpayer was required to put into the partnership business. *Schaeffer v. Commissioner*, decided September 1, 1948 (1948 P-H T. C. Memorandum Decisions, paragraph 10), affirmed *per curiam*, 174 F. 2d 827 (C. A. 3d), cert. denied, 338 U. S. 910. In any event, any income earned by the trustee as a partner with the taxpayer would be taxable to the taxpayer only to the extent it was received prior to January 13, 1944 [R. 62-63, 70-71], and thereafter hereinafter.

The taxpayer argues further that even if the amendment of January 13, 1944, amendment to the original trust instrument of November 20, 1942, is not given retroactive effect, nevertheless correction of the alleged clerical error was made by the amendatory documents executed on December 30, 1943, rather than on January 13, 1944, when the taxpayer signed the instrument, as the court below found. [R. 63], and since that was within the taxable calendar year of 1943 of the taxpayer and his wife as well as of the partnership net income for the fiscal year ended December 30, 1943, would, under Section 188 of the Internal Revenue Code, be taxable to the taxpayer.

entity of the trusts or the partnership be disre-
income accrued to the trusts from the partner-
close of the latter's taxable fiscal year ended
1943, should be included in the taxpayers' taxable
December 31, 1943, in computing their taxable
for that year, under the provisions of Section
that since their tax liabilities did not accrue until
ay of their taxable year 1943, and the alleged
error was corrected by the amendatory documents
y them on December 14th of that year, the tax-
grantors, were not required to include, in com-
ir net income for 1943, the income of the trusts
ear, even assuming that the trusts be held re-
until December 14, 1943. (Br. 61-64.) This
applies only to the taxpayers' calendar year
the partnership's fiscal year ended June 30, 1943,
other taxable years involved here. (Br. 65.)

s no basis in the record for these contentions.
ict Court found [R. 70-71] that the trust in-
contained no statement that they were not re-
the grantors, and that it was not until January
that there were executed amendments to the
uments which stated that they were not so re-
In harmony therewith, it concluded correctly that
al trusts created on November 20, 1942, simul-
with the partnership agreement, were revocable
execution of the amendments thereto on January
which was the effective date for the irrevocability
sts, and that date could not be retrojected into
n order to make the original trusts irrevocable.

415 (C. A. 9th). Contrary to the taxpayer's (Br. 61), the record clearly supports the District finding and decision to such effect for it shows unquestionably [R. 176-180, Ex. 14] that the amendments were signed first by only the taxpayer and as attested by notary public Natalie Holbrook, October 14, 1943 [R. 178-179, 180], and that, for undisclosed, they plainly were not accepted, acknowledged and signed by the trustee-bank officials, as attested by notary public Pauline Hudson, until January 13, 1944 [R. 177, 179.] Further support is found for this original declaration of trust [R. 117-127, Ex. 4] that the taxpayer and his wife *and* the trustee all signed the instrument *on the same day*, as attested by the notary [R. 125-127], just as they (except the taxpayer) did in the case of the partnership agreement [R. 128-130, Ex. A] which was executed on the same day as the amendments. [R. 40-41.] Moreover, the taxpayer furnishes no evidence whatever, other than his own statements, to the contrary, and we have been able to find nothing in the record. Certainly the taxpayer's bald statement is a "fact" that the officers of the bank merely acknowledged before the notary, on January 13, 1944, their signatures allegedly affixed to the instruments at an earlier date. They have no probative value here, and in the absence of any other evidence more convincing to the contrary, we must, as the court below held [R. 63], accept the original amendments, as written, for tax purposes.

In these circumstances, it is clear that, under the principles laid down by this Court in *Gaylord v. Commissioner*

the taxpayer-grantors of liability under Section Internal Revenue Code for federal taxes on the the trusts for the taxable year 1943. Hence, it hat the District Court properly sustained the oner's computations of the taxpayers' tax lia- the taxable year in question by using the part- proper fiscal year accounting basis in determin- taxable net income.⁸ [R. 67-68.] Section 188 Internal Revenue Code; *Gaylord v. Commissioner*, 415; *Fowler Bros. & Cox v. Commissioner*, 138 (C. A. 6th); *cf. Hash v. Commissioner*, 4 T. C. ned, 152 F. 2d 722 (C. A. 4th), certiorari de- U. S. 838, rehearing denied, 328 U. S. 879. , contrary to the taxpayer's claim (Br. 64), the ing gift tax returns on the basis of irrevocable not change the nature of the trusts and could t the effect and application of the federal tax more than could the Government's accepting re- of funds in the renegotiation of war contracts asis of the partnership's fiscal year accounting *Gaylord v. Commissioner, supra*, p. 415.

urt's decision in *Giffen v. Commissioner*, 190 F. 2d 188, shable in respect of this issue. There the fiscal year of ship between the calendar-year taxpayer and his wife, om transmuting their community property into property ants in common and operating it under the partnership

As to the many cases cited by the taxpayer (Eisenberg v. Commissioner, 161 F. 2d 506, 510 (C. A. 3d), certiorari denied, 332 U. S. 767; 34, 39, 40, 48), the District Court distinguished the principal ones (*Harris v. Commissioner*, 161 F. 2d 990 (C. A. 7th)) relied on by the taxpayer. In the *Harris* case, this Court merely reversed *per curiam* and remanded to the Tax Court to make findings regarding the *Culbertson* decision, but expressed no opinion on the merits of the case. While we think that the decision in the *Greenberger* case is wrong, as being contrary to the proper application of the rationale of the *Culbertson* case, the facts there were more favorable toward establishing a valid partnership than here. In any event, the *Tower*, *Lusthaus* and *Culbertson* cases laid down the controlling law to the effect that the parties must have intent to carry on the business as partners as to divide the income, the other cases cited by the taxpayer lead to no different result for they involved different factual situations. As stated in *Eisenberg v. Commissioner*, 161 F. 2d 506, 510 (C. A. 3d), certiorari denied, 332 U. S. 767:

Little can be accomplished toward ultimate determination of the tax responsibility, at least in this class of cases, by ferreting out analogous or other cases, particularly since "no one fact is decisive." It is well-settled that the Tax Court's determination, if supported by the facts, is controlling. That we would not be inclined to draw the same conclusions or make the same inferences is of no significance whatever. * * *

Conclusion.

gment of the District Court is correct and should
be affirmed.

Respectfully submitted,

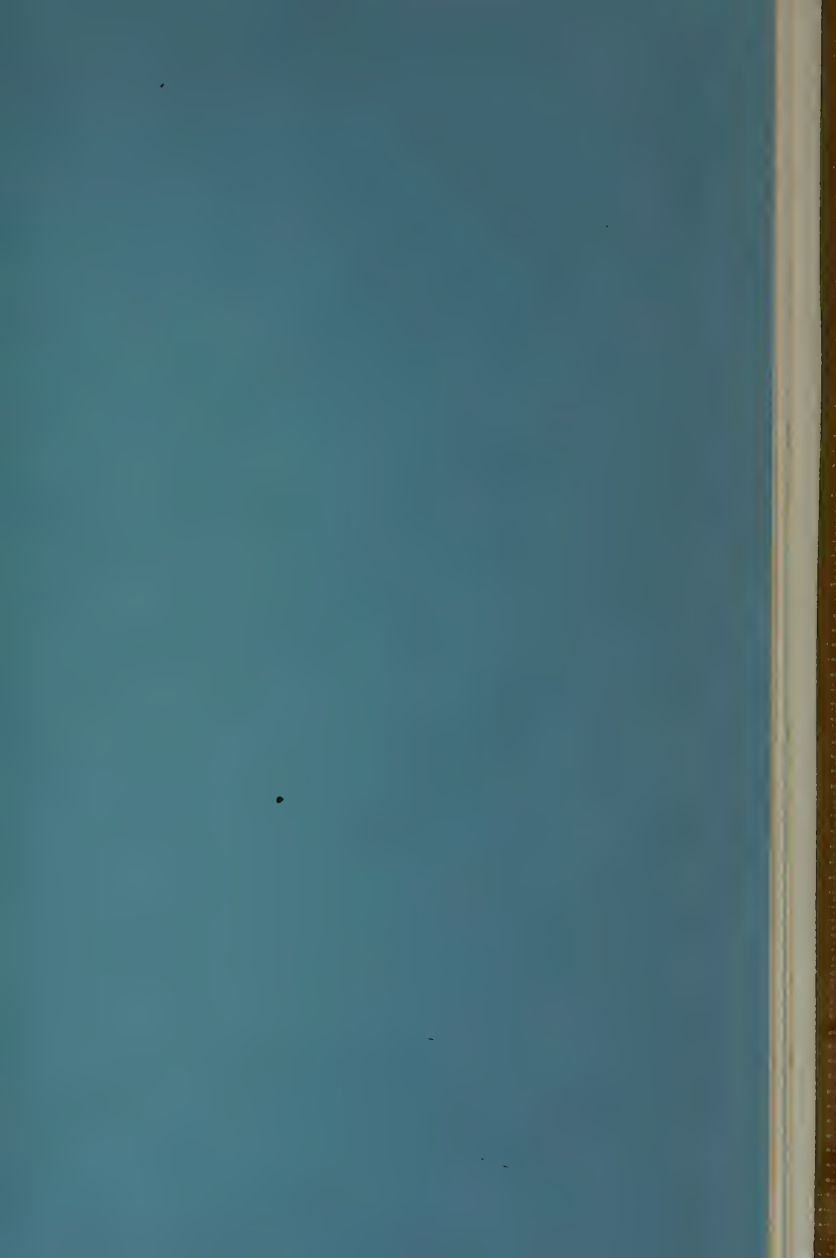
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, 1951.





APPENDIX.

Revenue Code:

11. NORMAL TAX ON INDIVIDUALS.

ere shall be levied, collected, and paid for each
le year upon the net income of every individual
mal tax * * *

J. S. C. 1946 ed., Sec. 11.)

22. GROSS INCOME.

) *General Definition.*—"Gross income" includes
, profits, and income derived from salaries,
s, or compensaiton for personal service, of what-
kind and in whatever form paid, or from pro-
ns, vocations, trades, businesses, commerce, or
or dealings in property, whether real or per-
growing out of the ownership or use of or
est in such property; also from interest, rent,
ends, securities, or the transaction of any busi-
carried on for gain or profit, or gains or profits
income derived from any source whatever. * * *

J. S. C. 1946 ed., Sec. 22.)

166. REVOCABLE TRUSTS.

ere at any time the power to revest in the
or title to any part of the corpus of the trust
ted—

1) in the grantor, either alone or in conjunc-

then the income of such part of the trust is included in computing the net income of the trust.

* * * * *

(26 U. S. C. 1946 ed., Sec. 166.)

SEC. 167. INCOME FOR BENEFIT OF GRANTOR.

(a) Where any part of the income of a trust is

(1) is, or in the discretion of the trustee, paid or payable to or for the use of any person not having a substantial interest in the disposition of such part of the trust property, or may be, held or accumulated for future distribution to the grantor; or

(2) may, in the discretion of the grantor, be paid or payable to or for the use of any person not having a substantial adverse interest in the disposition of such part of the trust property, or may be distributed to the grantor; or

* * * * *

then such part of the income of the trust is included in computing the net income of the trust.

* * * * *

(26 U. S. C. 1946 ed., Sec. 167.)

SEC. 181. PARTNERSHIP NOT TAXABLE.

Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.

182. TAX OF PARTNERS.

computing the net income of each partner, he include, whether or not distribution is made to

* * * * *

His distributive share of the ordinary net income or the ordinary net loss of the partnership, as provided in section 183 (b).

(U. S. C. 1946 ed., Sec. 182.)

188. DIFFERENT TAXABLE YEARS OF PARTNER AND PARTNERSHIP.

If the taxable year of a partner is different from that of the partnership, the inclusions with respect to the net income of the partnership, in computing the net income of the partner for his taxable year, shall be based upon the net income of the partnership for the taxable year of the partnership (whether beginning on, before, or after January 1, 1939) ending on or with the taxable year of the partner.

(U. S. C. 1946 ed., Sec. 188.)

3797. DEFINITIONS.

When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * * * *

Partnership and Partner—The term “part

tion, or venture is carried on, and which is the meaning of this title, a trust or estate corporation; and the term "partner" includes in such a syndicate, group, pool, joint venture organization.

* * * * *

(26 U. S. C. 1946 ed., Sec. 3797.)

Deering, California Civil Code (1949):

SEC. 2280. Unless expressly made irrevocable by the instrument creating the trust, every trust shall be revocable by the trustor by withdrawing the trust property with or without the trustee. * * *

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.22 (a)-1. *What Included in Income*.—Gross income includes in general all income from whatever source derived, whether or not such income is exempt from tax by law. (See sections 201 and 216.) In general, income is the gain derived from capital, from labor, or from both combined.

* * * * *

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

E. TOOR,

Appellant,

vs.

C. WESTOVER,

Appellee,

E. TOOR AND FLORENCE D. TOOR,

Appellants,

vs.

C. WESTOVER,

Appellee,

APPELLANTS' REPLY BRIEF.

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Appellee,

APPELLANTS' REPLY BRIEF.

I.

The Facts.

Statement of facts as presented in the Brief for the
s, in substance, a mere repetition of the findings
rial Court. The findings made by the Trial
ich are particularly material to the matters in-
this appeal, are without support in the evidence
ontrary to the uncontroverted established facts

and a sham transfer, is utterly without support contrary to all of the evidence in this case. The controverted facts show: (1) gifts of cash funds to the band and wife (the taxpayers) to a national bank as trustee; (2) the actual ownership by the bank as trustee of the cash funds thus received for the future benefit of the taxpayer's children (no payments to be made until termination of the trusts which expire when the children attain their respective ages of majority); (3) the organization of a limited partnership to carry on a furniture manufacturing business; (4) the bank as trustee a limited partner pursuant to clear and unequivocal partnership agreements, pursuant to which the bank acquired an ownership interest to the extent of one-half ownership for each of the two trusts; (5) the taxpayers did not in any manner own or benefit by the partnership or partnership owned by the bank; (6) the contributions of cash to the partnership by the bank was in proportion to the total capital of the partnership and the partnership rights of the parties to participate in profits; (7) the taxpayers (Mr. Toor) became the general partner and received reasonable compensation for all services rendered to the partnership; (8) the bank as trustee contributed the capital contributed by it to the partnership, and consequently owned the partnership interest from which the profits accrued; (9) although the taxpayers originally owned the furniture manufacturing business, the same was transferred

in accordance with the partnership agreements, of the parties complied with the terms of the partnership agreement: (11) Mr. Toor exercised the powers of a general partner and these were each and every used for partnership purposes only; (12) the trusts were consulted and advised with Mr. Toor; (13) the profits were allocated in accordance with ownership of the respective partnership interests, all assets of the partnership were used only for partnership purposes; (14) the income accrued to the trusts and there was no manner by which the taxpayer could deprive the trustee of the same; (15) the partnership was organized in 1942, when the value of the wood furniture manufacturing business in California was highly speculative; however, this business, due to subsequent general wartime conditions, experienced a windfall of large profits; (16) in the first few years of the partnership only approximately 40% of the profits were distributed and the remainder was retained to meet the needs of rapidly expanding the business; (17) by reason of their ownership of the partnership interest the trusts actually received their share of the profits; the Government assessed the tax on the partnership income which taxpayers did not own, did not pay and could not receive or benefit from.

On the exception of matters pertaining to the irrebuttable presumption of the nature of the trusts (to which reference will

The Ownership of the Assets Which Yielded Income Was a True Ownership.

The capital contributed to the partnership was the trustee, the partnership interest acquired by the trustee was likewise owned by the trustee, and the partnership agreement was clear and unequivocal. In light of these facts the Trial Court concluded that "the partnership did not form and carry on as a partnership for the meaning of the Internal Revenue Code during the taxable years involved in this case, the furniture manufacturing business known as The Furniture Guild of California." In effect the Trial Court said that there was no partnership "for income tax purposes."

As stated in the concurring opinion in *Barrett v. Commissioner* (1st Circuit, 1950), 185 F. 2d 150, 151:

"In cases of this sort, involving taxation of family partnerships, a great deal of considerable confusion has been engendered by the fact (which obtained some currency) that an arrangement which for general purposes would be deemed a partnership under the usual common law test must not necessarily be recognized as a partnership for income tax purposes.' Thus was introduced a new concept; and the need arose to give some legal definition of the special elements constituting a partnership for income tax purposes,' where the reported partnership is between members of a family group. So far as I can see, this concept was utterly devoid of statutory basis, as is the concept of a partnership for income tax purposes."

d. 1659, the effect of that case is to sweep this
er notion into the discard. This is more sharply
ed up, perhaps, in the concurring opinion by Mr.
ce Frankfurter. But the same viewpoint is dis-
ble from a reading of the majority opinion as a
e."

ry way in this case the evidence demonstrates.
ft of the income of the business, but an actual
roperty and the passing of title thereto, which
r produced the income in question. The one-
nership of the partnership belonged to each of
s and the only way the taxpayers could get it
s to buy it back the same as if owned by a

The bank, acting as a trustee, was a stranger,
ent and free acting, and not in any respect sub-
e control of the taxpayer. Under the state of
nce in this case the Trial Court could not conclude
dealings between the taxpayer and the bank, and
ngs between the bank and the partnership, were
ubterfuge, or concealment for the purpose of de-
[R. 137-160, 338-396, 439-443, 169-172.]

upport the assertion that the ownership of the
terests in the partnership was a mere sham or a
llocation of income, would require a determina-
the taxpayer and the bank stood ready to violate
ership agreement and their fiduciary obligations
ne. At the time of trial the Trial Court recog-
t the evidence was all directly to the contrary.

ership should be disregarded for tax purposes because Mr. Toor, as the general partner in this limited partnership, had the management and control of the entire partnership (Resp. Br. p. 12.) This is a reiteration of the position set forth in Finding 24, wherein the Trial Court ruled that because of Mr. Toor's control and "recognition of so many attributes of ownership of the trust and of *this business*" he must be charged with the fruit of the capital he did not own. These "attributes of ownership" in this case consist of nothing more than this nominal control Mr. Toor had as a general partner for the partnership purposes of a limited partnership.

The Trial Court disregards the question as to the amount of income produced by capital of the partnership when in fact such capital was a major income producing factor, and the Trial Court further disregards the fact that Mr. Toor received a separate and reasonable compensation for all of his services and abilities, which was charged as an expense of operation and deducted from the computation of profits of the partnership. If the taxpayer having been fully compensated for everything he as an individual contributed to the partnership, the principal issue in this case is concerned with the remaining income produced by the capital of the partnership, which should be taxed to the owners of the partnership, in accordance with the decision in *Lucas*, 281 U. S. 111, 50 S. Ct. 241. In spite of the fact that one-sixth of this partnership and its capital was actually owned by each of the two trusts, the Court has determined *for tax purposes* Mr. Toor should be regarded

er words, the Government is frankly contending
p. Br. p. 24, p. 19, footnote 6), and the Trial
as in effect ruled, that the normal management
rol of a general partner in a limited partnership
cient attribute of ownership to convert an other-
d partnership into an invalid one for tax purposes
e limited partners are members of the family and
e donated capital.

ention is contrary to the principles enunciated
ower and *Culbertson* cases. (See particularly
ence in the *Culbertson* case at 337 U. S. 744, 69
15.) In the words of the *Culbertson* case, such a
icates at best an error in emphasis . . . and
ecisive what was described as 'circumstances [to
] into consideration" in making the determination
ether the partnership is real. See also, *Miller v.*
itioner (6th Cir. 1950), 183 F. 2d 246, 254; *Cobb*
issioner (6th Cir. 1950), 185 F. 2d 255, 258.
cases applying the principles of the *Culbertson*
e ruled against this contention of the Government.
nger v. Commissioner (7th Cir. 1949), 177 F. 2d
mb v. Smith (3rd Cir. 1950), 183 F. 2d 938.

ue that the concurring opinion in the *Tower* case
the position presently urged by the Government,
a family limited partnership, formed with capi-
ted by the general partner, is not to be recog-
tax purposes. However, as specifically pointed
r. Justice Frankfurter in his concurring opinion
Culbertson case (337 U. S. 750, 69 S. Ct. 1218),
wer opinion did not say what the Government

It is true that Mr. Toor in the exercise of his power as the general partner in a limited partnership has control of the partnership business for partnership purposes. Inherent in the nature of a limited partnership is the fact that the limited partners are inactive and the general partner is the active controlling participant in the conduct of the partnership affairs. As stated in concurring opinion in *Barrett v. Commissioner*, 336 U. S. 154:

“Not infrequently one or more *bona fide* partners may be inactive or dormant, this factor being compensated by the payment of salaries to the inactive partners. So here, the partnership agreement provided that the partners ‘shall be paid such salaries as may be agreed upon, to be charged as an expense of the business.’ Such an arrangement, so far as we can see, involves no problem of *Lucas v. Earl*, 341 U. S. 111, 74 L. Ed. 731. If the partnership agreement provides that the dormant partner is to receive one quarter of the net profits, such share of the net income, whether distributed or not, is taxable to the dormant partner under I. R. C. sec. 182. The share is taxable to the active partners on the theory that they ‘earned’ it.”

In any event, the Trial Court ignored the distinction between the control of an owner of a business and the control only to himself, and the control of a general partner in a business owned only in part by himself. The control of a partner is limited by his fiduciary obligations, and is likewise limited by the provisions of his contract and the regulations prescribed by law.

no "business purpose" in the formation of the p. In this respect the Government contends term "business purpose" as used in the *Culbertson* does not exist unless there is a benefit to the business. Br. pp. 20-22). The Government's contention is directly contrary to the substance of the opinion and would make one factor, to wit, the existence of a benefit to the business, conclusive. The Government has not adopted the requirement that there be a benefit to the business in order for the partnership to be valid. See *Miller v. Commissioner*, (6th Cir. 1950) 182 F. 2d 246, 254, which holds directly contrary to the Government's contention. The *Culbertson* case states 304 U.S. 744, 69 S. Ct. 1215):

"Upon a consideration of all of the facts, it is concluded that the partners joined together in good faith to conduct a business, having agreed that the services of each partner and the capital to be contributed presently by each is of sufficient value to the partnership that the contributor should participate in the distribution of profits, *that is sufficient.*" (Emphasis added.)

It is submitted that what is meant by the phrase "business purpose" in the *Culbertson* opinion is simply a true partnership formed for the purpose of carrying on the business rather than a *mariage de convenance*. See *Barth v. Commissioner*, *supra*, at page 151. Cf. *Slifka v. Commissioner* (2d Cir. 1950), 182 F. 2d 345, 346.

The present case is entirely distinguishable and unlike the case of *Giffen v. Commissioner*, 190 F. 2d 188, de-

upon which to rest a valid partnership with the
In the instant cause the gifts in trust and the pa
arrangement were a part of a plan resulting fro
tic difficulties between Mr. and Mrs. Toor. It
time after the taxpayers determined a course o
with respect to their assets and provision for t
dren that the tax consequences were examined.
99, 103-105, 296-298, 309-310, 318-322, 327-3

As stated in *Barrett v. Commissioner, supra*, at p

“There is nothing in the law of federal in
ation forbidding members of an intimat
group who wish to go into business together
a partnership because that form of busines
zation is advantageous to them from the tax
view.”

The Government is clearly in error in asserting
Toor had complete and exclusive power of alloc
disposition of the income from the business. (J
pp. 18, 19.) The provision vesting in the genera
the discretion as to when to distribute profits was
function of management, and in view of the
capital requirements of this business and the
which it was operating, a very necessary provis
course, Mr. Toor could not make distribution t
without making proportionate distribution to th
partners, and could not derive any personal ben

ly to all the partners. In this connection we
Trial Court's observation during the trial [R.
this very element indicated that the partner-
not a paper organization.

Government also observes that Mr. Toor was em-
to terminate the partnership by appropriate notice
t the limited partners (Resp. Br. p. 18). How-
Toor could not in any way deprive the trusts of
ership of their proportionate shares of the busi-
of their accrued income; in order to acquire
ests he would have had to pay full book value
[R. 37-38]. Furthermore, the testimony dis-
t the provision had a valid business reason [R.
and in addition, was a perfectly normal pro-
a limited partnership. Of course, if Mr. Toor
ased the interest of the partners, they could
rwise invested these same funds in accordance
trust agreement.

Government contends that the limited partners
exercise their rights as such. The evidence
radicted that the bank did use independent
; that Mr. Toor kept the bank informed of
ct of the business, and consulted with the
ers from time to time; that the bank received
l accountings and did consider the same, and felt
that the bank met with Mr. Toor for the pur-

national bank. No instance has ever been suggested what other advice the bank could or should have given any time. It is true that the bank did not feel called upon to assert its rights by legal process, because it was satisfied that the business was properly conducted and that it was receiving everything to which it was entitled.

In the face of this uncontradicted testimony and evidence in this case, the Court made its findings numbered 22 and 23, clearly holding and finding that at no time did the bank use independent judgment to suggest any action or exercise any of its rights in any way of advice, and that the bank did not exercise any influence or control over the trust *corpus* in the business, and that it did not influence the conduct of the partnership or the disposition of its income. In view of this misapprehension by the Court it is evident that only an improper result has resulted.

The Government urges that there was no trust created by the completed gift because the trusts and the partnership were completed as "one package." We note that the partnership was empowered to invest in securities of the United States and of the states and instrumentalities thereof, as well as in businesses in which Mr. Toor participated as a principal, and that they actually did so invest. Even if the mere fact that the trusts and partnership were concluded at the same time would not invalidate the gift or render the same incomplete. In so far as our inquiry is concerned, the same result would have been achieved if the taxpayers had given to the trusts the partial ownership of the business assets, and

was effectuated, the gift was complete and the donees became the actual owners of their respective parts and interests. A man may give to his children a part of the real property he owns or part of the stock of a business in which he is principal partner, or he may give them the money with which to purchase such assets; in either event, the children are taxable with the income therefrom. See *Commissioner* (6th Cir. 1937), 90 F. 2d 323; *Commissioner*, (1941), 45 B. T. A. 855.

In this matter, the Government contends that in any event the Trial Court looked at all the circumstances in connection with the *Culbertson* opinion and found as a matter of fact a lack of intent to form a valid partnership, and therefore its findings are conclusive. However, when demonstrated, this conclusion is based upon findings which have no support in the evidence, and it is upon the part of the Trial Court to consider all the material facts and represents an improper application of the principles of law enunciated in the *Culbertson* case. It is respectfully submitted that an inference of partnership contrary to all of the evidentiary facts may not be drawn by the Trial Court at will and without chal-

The opinion of the Court is also respectfully invited to the effect that the Report which contains the relevant portions of the Revenue Act of 1951 recently adopted, and the pertinent sections of the hearings of the Senate Finance Committee which deal specifically with many of the issues

The Argument With Respect to the Date of bility of the Trusts.

The argument for the Government with respect to the irrevocability of the trusts pointedly ignores the distinction brought out by Appellants between the clerical or typing error of the instant case, and the error presented in *Gaylord v. Commissioner* (9th Cir. 1941, 11 F. 2d 408, where the document was in the form intended by the taxpayer but where he erred in interpreting its legal effect. The Government contents itself with a portion of the argument with simply pointing out that the trust documents, as originally executed, did not contain a provision making them irrevocable; that under the California law they were therefore revocable and that the ruling of the Trial Court that the instruments should be taken as written, is obviously correct. (Resp. B. 31.)

If the parties had signed the trust document, believing it to be irrevocable but failed to include an irrevocability clause either because they thought it was not necessary or because they did not think about it at all, they would have a situation similar to that presented in the instant case. However, here the parties had seen, reviewed and discussed the drafts of the documents containing the irrevocability clause but by the time they came to sign the final draft the irrevocability clause had been inadvertently omitted from the final draft by a typing error; they were believing the document they signed to be a trust document, and the draft they had seen, including the clause in

dated December 14, 1943 confirming what the intention was, the Trial Court should have accognition to the nature of the error, and read the contents as if the irrevocability clause had been confirmed. This would have followed the dictates of Article 1640 of the Civil Code of California which provides that if through mistake or accident a written contract does not express the real intention of the parties, such instrument is to be reformed. By properly construing the instrument in accordance with Sec. 1640, the Court would have been reforming the instruments nor converting them into one for reformation.

The Trial Court in this case was called upon to rule on the issue just as it was called upon to rule and did (though incorrectly) as to whether or not the instrument was executed on the date it bore or on some other date. The Trial Court erred in stating that for reasons it was compelled to take the instrument as it was and further erred in avoiding a decision on this issue on the premises that this was not an action for reformation.

It is, that the *Gaylord* ruling is based, at least in part, on the rule that parole evidence was inadmissible to explain the terms of the instrument therein questioned. In the instant case, the type of error we have here is a mere imperfection in the writing—has specifically created an exception to the parole evidence rule.

See *California Code of Civil Procedure*, Sec. 1856; *Civil Code*, Sec. 1640.

Trust. This is so for the same reason as above—to—the type of error corrected was an imperfect writing, and the original instruments were restored to the condition the parties thought they were in when they signed them.

In the *Gaylord* case, the taxpayer, having signed a document that he intended to sign, was entitled to have it conform to his original intent, but the change could not be given retroactive effect. In our case, the correction of the instruments dated December 14, 1943, is different; it was not merely to restore an intent supposed to have been conveyed by the instruments, but to restore the words themselves which were omitted by a typing error and to confirm the original intent. The correction of this type of error should be given retroactive effect in accordance with Section 1640 of the Internal Revenue Code.

Finally, with respect to Appellants' contention that the documents were executed on December 14, 1943, rather than on January 13, 1944 as the Trial Court found (finding 14), the Government misconstrues the rule of law applicable to the evidence.

It is not disputed that the only evidence on this point consists of the documents themselves which read: "WITNESS WHEREOF, the parties hereto do hereunto set their hands this 14th day of December, 1943." [Finding 179]. The signatures of the bank officers were dated and signed on January 13, 1944. This acknowledgment does not recite that they *executed* the instruments on January 13, 1944, but simply that these officers subscribed

Government asserts that in the absence of any evidence, we must take the date of execution to be that of acknowledgment. This is directly contrary to the law, and furthermore, the Government misreads the terms of the acknowledgment, for the Government states that the acknowledgment recites that the instruments were not signed until January 13, 1944. We note that there was no requirement that the instrument dated December 14, 1943 be acknowledged in order to be effective.

It is clear that under the state of the evidence we must take the date the instrument bears, December 14, 1943, as the date on which all the parties executed the instrument. Section 1963 (23) of the Code of Civil Procedure of the State of California provides that it is a presumption that a writing is truly dated. Section 1961 of the Code of Civil Procedure provides: "A presumption declared by law to be conclusive) may be controverted by other evidence, direct or indirect; but unless so controverted the jury are bound to find according to the presumption." Since there was no evidence whatsoever, direct or indirect, to controvert the presumption furnished by the instrument itself and its recital that the parties executed it on December 14, 1943, the Court was compelled to find in accordance therewith. *Crabbe v. Mannel Gold Min. Co.*, 168 Cal. 500, 506, 143 P.2d 716. *In re Roberts Estate*, 49 Cal. App. 2d 71, 123 P.2d 933.

We note further, that the Government has that this inadvertent omission of the irrevocability provision from the original trust instruments supports the Court's conclusion as to the lack of intent to form a faith partnership (Resp. Br. pp. 17-18). However, it is undisputed that the actual intent of the parties was to include an irrevocability provision and to make the trust irrevocable. The inadvertent omission could not in any way support a finding as a factual matter of no intent to form a partnership.

Conclusion.

It is respectfully submitted that the decision of the Trial Court should be reversed.

Respectfully submitted,

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Appendix.

Act of 1951, approved October 20, 1951 (21-Public Law 183):

10. Family Partnerships.

Definition of partner.—Section 3797(a)(2) (26 U. S. C. 3797(a)(2)) is hereby amended by adding at the end thereof the following: 'A person shall be treated as a partner for income tax purposes if he holds a capital interest in a partnership in which capital is a material income-producing factor, whether or not such interest was derived by purchase or gift from any person.'

Allocation of partnership income.—Supplement F to Section 181 (26 U. S. C. A. Sec. 181 *et seq.*) is hereby amended by adding at the end thereof the following new

11. Family partnerships.

In the case of any partnership interest created by a transfer of a distributive share of the donee under the partnership agreement shall be includible in his gross income to the extent that such share is determined to be in excess of reasonable compensation for services rendered to the partnership by the donor, and to the extent that the portion of such share attributable to contributed capital is proportionately greater than the portion attributable to the donor's capital. The share of a partner in the earnings of the partnership shall not be diminished because of absence due to military service. For the purpose of this section, an in-

be considered to be donated capital. The "any individual shall include only his spouse, and lineal descendants, and any trust for the profit of such persons."

"(c) Effective date.—The amendments made by this section shall be applicable with respect to taxable years beginning after December 31, 1950. The determination as to whether a person shall be recognized as a partner for income tax purposes for any taxable year beginning before January 1, 1951, shall be made as if the amendments had not been enacted and without reference to the fact that this section is not expressly made applicable with respect to taxable years beginning before January 1, 1951. In applying this subsection where the taxable year of any family partner is different from the taxable year of the partnership—

"(1) if a taxable year of the partnership begins in 1950 and ends within or with, as to all of the family partners, a taxable year which begins in 1951, then the amendments made by this section shall be applicable with respect to all distributive shares of income derived by the family partners from such taxable year of the partnership beginning in 1950, and

"(2) if a taxable year of the partnership begins in 1951 and ends within or with a taxable year of a family partner which began in 1950, then the amendments made by this section shall not be applicable with respect to the distributive shares of income derived by the family partners from such taxable year of the partnership

family partnerships

339 of your committee's bill is intended to harmonize the rules governing interests in the so-called partnership with those generally applicable to other property or business. Two principles governing the distribution of income have long been accepted as basic: (1) income from property is attributable to the owner of the property; (2) income from personal services is attributable to the person rendering the services. There is no reason for applying different principles to partnership interests. A gift of an individual makes a bona fide gift of real property. If a share of corporate stock, the rent or dividend from a share is taxable to the donee. Your committee's bill makes it clear that, however the owner of a partnership interest may have acquired such interest, the income is taxable to the owner, if he is the real owner. If the partnership is real, it does not matter what motivated the transfer to him or whether the business benefited from the addition of the new partner.

Although there is no basis under existing statutes for the present treatment of partnership interests, some decisions in this field have ignored the principle that income from property is to be taxed to the owner of the property. Recent decisions since the decision of the Supreme Court in *Commissioner v. Culbertson* (337 U. S. 733) have held invalid for tax purposes family partnerships created by virtue of a gift of a partnership interest to a member of a family to another, where the donee rendered no vital services for the partnership. Some courts apparently proceed upon the theory that a

that a gift of a partnership interest is not complete if the donor contemplates the continued participation in the business of the donated capital. However, the standard with which the Tax Court, since the *Culbertson* decision, has held invalid family partnerships based upon a gift of capital, would seem to indicate that, although the opinions often refer to 'intention,' 'business purpose' and 'control,' they have in practical effect reached conclusions which suggest that an intrafamily gift of a partnership interest, where the donee performs no substantial services, will not usually be the basis of a valid partnership for tax purposes. We are informed that the settlement of these cases in the field is being held up by the reliance of the field offices of the Bureau of Internal Revenue upon some such theory. Whether or not the opinion of the Supreme Court in *Commissioner v. Tower* (327 U. S. 281) and the opinion of the Supreme Court in *Commissioner v. Culbertson* (337 U. S. 733), which attempted to overrule the *Tower* decision, afford any justification for the confusion is not material—the confusion exists.

"The amendment leaves the Commission and the courts free to inquire in any case whether the donee or purchaser actually owns the interest in the partnership. If the transferor purports to have given or sold his interest, it will arise where the gift or sale is a mere sham. In other cases will arise where the transferor retains control over some of the incidents of ownership that he will con-

part in an analogous trust situation involved in *Helvering v. Clifford* (309 U. S. 351). The standards apply in determining the bona fides of family partnerships as in determining the bona fides of other transactions between family members. Transactions between persons in a close family group, not involving partnership interest, afford much opportunity for deception and should be subject to close scrutiny. All the facts and circumstances at the time of the gifted gift and during the periods preceding and following it may be taken into consideration in determining bona fides or lack of bona fides of a purported gift.

Every restriction upon the complete and unfettered control by the donee of the property donated will render the gift of sham in the transaction. Contractual restraints may be of the character incident to the normal relations among partners. Substantial powers may be retained by the transferor as a managing partner or in a fiduciary capacity which, when considered in light of all the circumstances, will not indicate any lack of ownership in the transferee. In weighing the effect of a retention of any power upon the bona fides of a gifted gift or sale, a power exercisable for the benefit of others must be distinguished from a power reserved to the transferor for his own benefit.

It is now necessary to make clear the

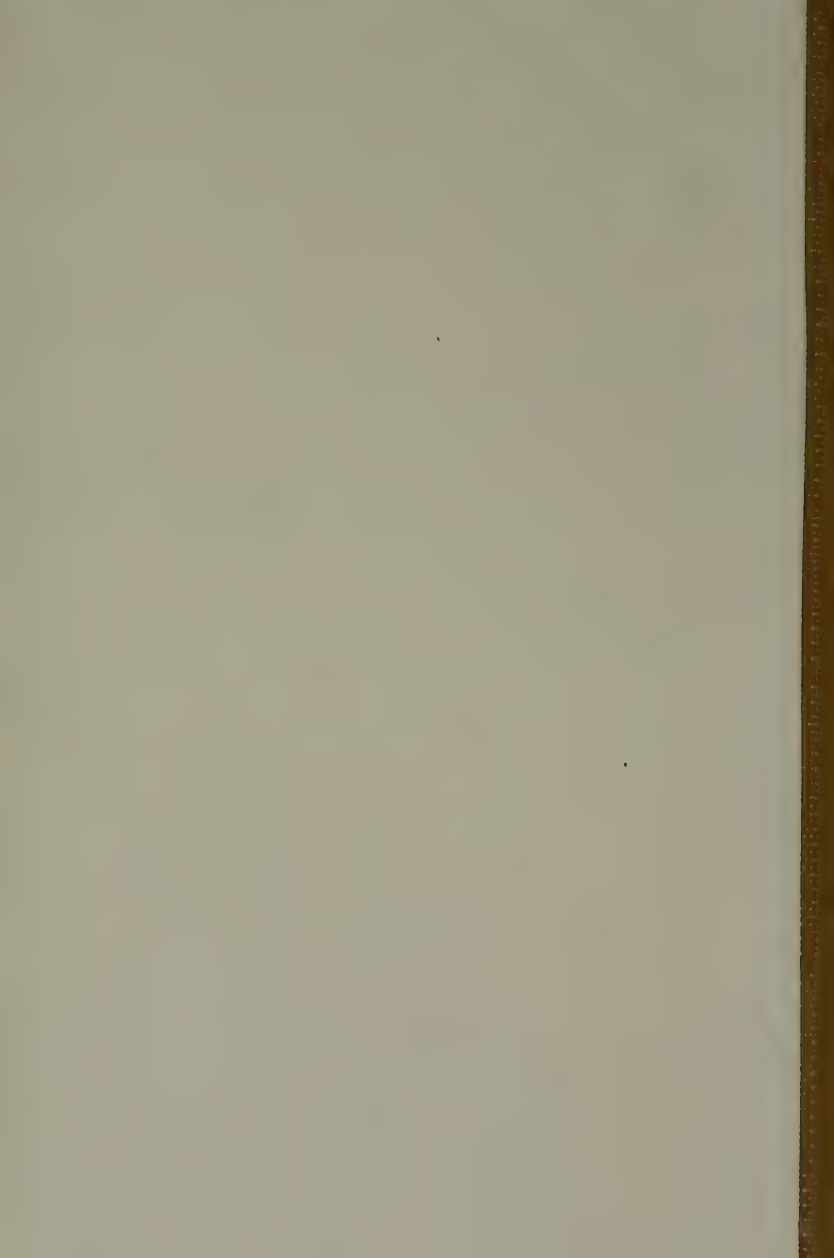
be respected for tax purposes without regard to motives which actuated the transfer, it is considered appropriate at the same time to provide specific safeguards whether or not such safeguards may be inherent in a general rule—against the use of the partnership to accomplish the deflection of income from the donor.

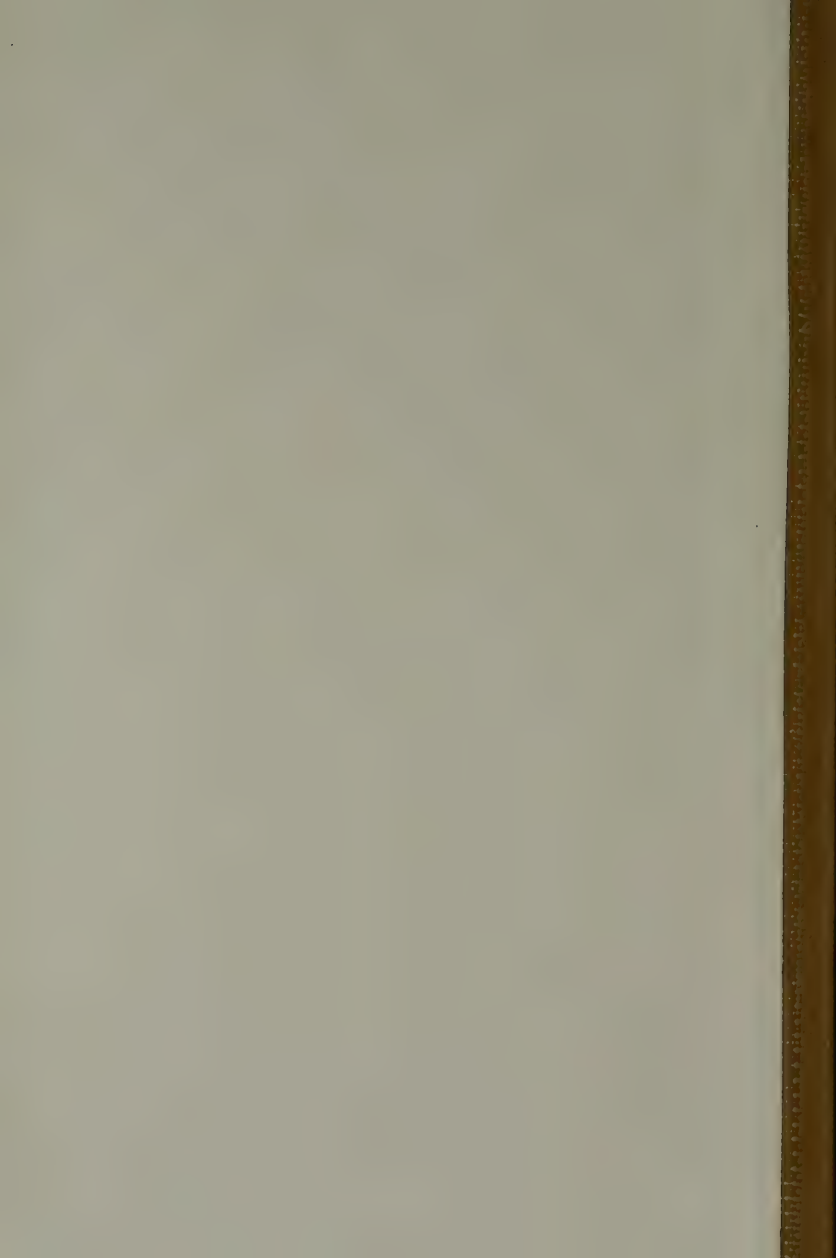
“Therefore, the bill provides that in the case of a partnership interest created by gift the allocation of income, according to the terms of the partnership agreement, shall be controlling for income-tax purposes except when the shares are allocated without proportionance of reasonable compensation for services rendered to the partnership by the donor, and except to the extent that the allocation to the donated capital is proportionally greater than that attributable to the donor's share. In such cases a reasonable allowance will be made for the services rendered by the partners, and the balance of the income will be allocated according to the amount of capital which the several partners have invested. The distributive share of a partner in the earnings of the partnership will not be diminished because of a partner's absence from military service.

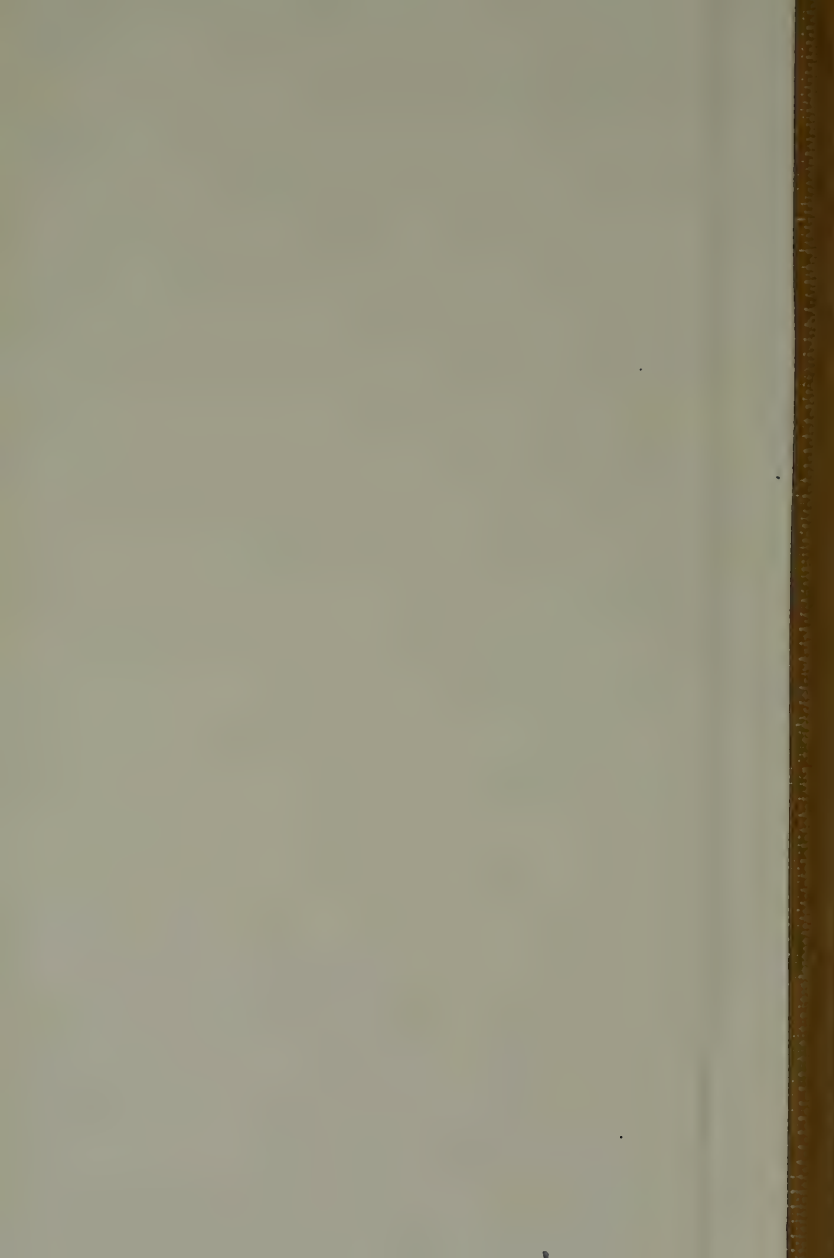
“When more than one member of a family is a partner in a partnership, all interests purchased by one member of the family from another will be treated as if no such transfer were made by gift. For this purpose

Errata in Appellant's Opening Brief.

- 4: The citation for Thomas v. Feldman should be Thomas v. Feldman (5th Cir. 1946), 158 F. 2d 1631. Feldman v. Thomas, 34 A. F. T. R. 1631.
- 5: The first page reference to the transcript on line 3 should read: R. 137-160 instead of 137-161.
- 7: The period in the first sentence of the last paragraph should be changed to a comma so that the paragraph reads:
- Bank was also consulted and its agreement was obtained and obtained for the termination of the partnership distribution of the assets and investment in the corporation which succeeded to the business of the partnership."
- 11: The word appearing as "severly" on the 13th line should be "severely."
- 15: The word "revocable" in the next to the last sentence of the first paragraph should be "irrevocable."







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